SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 422

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
PETITIONERS,

vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 29, 1952
CERTIORARI GRANTED DECEMBER 15, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
PETITIONERS,

vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE,
ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Record from U.S.D.C., District of Columbia	1	1
Petition for Writ of Habeas Corpus for Appellant Robert W. Burns	1	1
Motion to Discharge the Rule to Show Cause and Dismiss the Petition for Writ of Habeas Corpus	7	5
Petition for Writ of Habeas Corpus for Appellant Herman P. Dennis, Jr.	10	9
Motion to Discharge the Rule to Show Cause and Dismiss the Petition for Writ of Habeas Corpus	17	15
Memorandum Opinion in the Case of Robert W. Burns (Note: Memorandum Opinion involving Appellant Herman P. Dennis was not included since the two Opinions are identical.)	21	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPT. 8, 1952.

—3687

	Original	Print
Record, from U.S.D.C., District of Columbia—Continued		
Order dismissing petition for writ of habeas corpus of Robert W. Burns (Note: Order of the Court in the Case of Appellant Herman P. Dennis was not included since the two Orders are identical.)	23	20
Proceedings in U.S.C.A., District of Columbia Circuit	24	21
Minute entry of argument and submission (omitted in printing)	24	
Opinion, Prettyman, J.	25	22
Dissenting opinion, Bazelon, J.	48	44
Judgment	61	57
Order amending judgment	61a	58
Designation of record (omitted in printing)	62	
Clerk's certificate (omitted in printing)	64	
Order allowing certiorari	65	58

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 3871

ROBERT W. BURNS, Petitioner,

v.

ROBERT A. LOVETT, Secretary of Defense; THOMAS K. FINLETTER, Secretary of the Air Force; General Hoyt S. Vandenberg, Chief of Staff, United States Air Force

PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court for the District of Columbia:

Comes now the petitioner, Robert W. Burns, by his attorneys, Frank D. Reeves, Thurgood Marshall and Robert L. Carter, and respectfully shows that:

1. He is a Negro, a citizen of the United States and a member of the United States Air Force, AF 39 341 855. At the time of his court-martial conviction, which is assailed herein, he was stationed on the island of Guam, an insular possession of the United States, as a Staff Sergeant in the 12th Air Ammunition Squadron, APO 264.

2. He is unjustly and unlawfully detained and imprisoned under color of authority of the United States, in the custody of Headquarters, Japan Logistical Command, APO 503. Said Command is under the authority of, and responsible to, Robert A. Lovett, Secretary of Defense; Thomas K. Finletter, Secretary of the Air Force; and General Hoyt S. Vandenberg, Chief of Staff, United States Air Force, all of whom are within the jurisdiction of this Court.

3. The cause or pretext of such detention is by virtue [fol. 2] of a trial by general court-martial for murder and rape in violation of Article of War 92 on May 27-30, 1949, at Headquarters, 19th Bombardment Wing (Medium), APO 334, resulting in petitioner's conviction and sentence of death. The court-martial proceedings were approved by

the reviewing authority, and the record forwarded to Washington for appellate review in the office of the Judge Advocate General, United States Air Force. On March 14, 1950, a Board of Review, and on 18 August, 1950, the Judicial Council, 4 Court Martial Reports (AF) 907, found the conviction and sentence legally sufficient and recommended confirmation. The Judge Advocate General concurred in these conclusions, and on August 3, 1951, the conviction and sentence were confirmed and ordered executed by the President pursuant to Article of War 38. Petitioner made application to the Judge Advocate General for a new trial, pursuant to Section 12, Act of May 5, 1950 (formerly Article of War 53), and on January 28, 1952, his petition for a new trial was denied. Petitioner has now exhausted all available remedies provided by the military, and his only recourse is to seek redress in this Court by way of this petition.

4. All of said actions resulting in the continuing restraint and imprisonment of your petitioner are illegal and in violation of the Articles of War and the Fifth Amendment to the Constitution of the United States in that the original conviction and sentence by court martial was beyond the jurisdiction of the United States Air Force and was secured in a manner violative of petitioner's rights as a citizen of the United States, as a member of the United States Air Force and as a person subject to laws and regulations of an insular possession of the United States.

5. On December 11, 1948, Ruth Farnworth, a white civilian worker on Guam, was found missing under circumstances leading to the belief that a crime had been committed. On about December 13, she was found in a wooded area near the place where she worked. She was unconscious and in a critical condition. As a result of medical examina-
[fol. 3] tion, it was concluded that she had been raped and beaten. She was taken to a hospital and on December 14 she died without recovering consciousness.

6. On January 7, 1949, military authorities turned petitioner over to civil authorities on the island of Guam, who placed him under arrest and held him in detention. These officials were officers and men of the United States Navy and subject to the orders of the President of the United States and his appointees. For the next several weeks,

petitioner was held incommunicado in a death cell at Agana jail without process, subjected to continuous questioning, beaten, denied sleep and edible food. (Affidavit of E. E. Grimmett filed herewith as Exhibit A) He was not allowed to consult counsel during the entire period he was held in custody by the authorities of Guam, and in fact petitioner was not furnished counsel nor allowed to obtain the advice of counsel until one day before his trial by general court martial which began, as heretofore alleged, on May 27, 1949. (Exhibit A) On or about January 30, 1949, petitioner was returned by the authorities of Guam to the custody of Headquarters, 19th Bombardment Wing (Medium), United States Air Force. On February 20, 1949, he was officially charged with rape and murder and after investigation by military authorities, trial by general court martial was ordered, and petitioner was tried and convicted as heretofore alleged.

7. Petitioner was arrested, detained, interrogated and intimidated in violation of the Penal Code of Guam in force in January 1949, namely Sections 686, 780 and 825 thereof, and the Bill of Rights of Guam (set forth in Appendix hereto) and the Constitution of the United States. As a result of these unlawful tactics, Herman Dennis and Calvin [fol. 4] Dennis, who were arrested at the same time and subjected to the same treatment, signed coerced confessions and implicated petitioner in the crime for which he was finally charged and convicted. The fruits of these unlawful activities were used by the United States Air Force against petitioner in his trial by general court martial in violation of the Constitution of the United States and the Articles of War. Further, upon petitioner's being taken in custody by the United States Air Force, continued pressure and intimidation were used to get him to confess implication in the crime. (Exhibit A; Affidavits of Edward Daly, filed herewith as Exhibits C, D and E) Failing in this, the military authorities used threats and promises in an attempt to get Calvin Dennis (Affidavit of Calvin Dennis, filed herewith as Exhibits G and H) and Herman P. Dennis, Jr. (Exhibit A and Affidavit of Herman P. Dennis, Jr., filed herewith as Exhibit B) to testify against petitioner at his court-martial trial. Both the police authorities of Guam and the military authorities of the United States Air Force contrived a con-

viction through the pretense of a trial and the presentation of testimony known to be perjured in violation of the Articles of War and the Fifth Amendment to the Constitution of the United States.

8. Although petitioner was tried by general court martial for a capital offense, counsel furnished him had only one day to prepare his defense, thereby depriving petitioner of his right to effective counsel. (Exhibit A) Important evidence tending to show his innocence was suppressed. (Exhibits C, D and E) The testimony of Calvin Dennis against him at this trial resulted from threats and promises of special consideration if Calvin Dennis agreed to testify against your petitioner. (Exhibits A, C, D, G and H) This testimony, Calvin Dennis, now by his voluntary sworn [fol. 5] affidavit hereto attached, admits was perjured and that any and all statements he made intending to establish the guilt of petitioner were false, all of which is in violation of petitioner's rights of due process as secured by the Constitution and laws of the United States and the Articles of War.

9. The entire trial was conducted in an atmosphere of terror, hysteria and vengeance (Exhibits A, C, D, and affidavit of Mary L. Hill, filed herewith as Exhibit F) thereby preventing petitioner from being afforded due process as guaranteed by the Constitution of the United States and rendering his trial, conviction and sentence wholly unconstitutional and void.

10. Except for testimony of Calvin Dennis, which the latter now admits was perjured, no testimony in the record in any way directly connects this petitioner with the crime for which he was charged and convicted. Petitioner then and now professes that he is completely innocent of the crime for which he stands convicted and condemned to death.

11. The cumulative effect of all of the above-stated conditions was to make petitioner's trial a mask for the denial of petitioner's constitutional rights. Petitioner contends that he is entitled as an American citizen and an airman in the United States Air Force to a fair and impartial trial in accordance with the guarantees of the Constitution of the United States and the Articles of War, and in that he was

denied these fundamental rights, he is entitled to release from custody of respondents.

Wherefore, your petitioner prays:

1. That a writ of habeas corpus issue out of this Court directed to Robert A. Lovett, Secretary of Defense; Thomas K. Finletter, Secretary of the Air Force; General Hoyt S. Vandenberg, Chief of Staff, United States Air Force; or [fol. 6] some person and persons acting in their place and stead, requiring them to order Headquarters, Japan Logistical Command to produce the body of your petitioner before this Court at some time convenient to be designated, to abide by what shall be awarded by the Court in premises, to discharge petitioner from said imprisonment, and for all general and equitable relief.

2. That in the alternative, a rule to show cause why such writ should not issue directed to said respondents be granted herein.

3. That a hearing be had before this Court to inquire into and determine the legality of said detention and that pending said hearing, said respondents, and each of them, be required to stay execution of the sentence of death against the petitioner pending final determination of this petition.

4. That upon final hearing, petitioner may be discharged from said custody.

5. For other and further relief as to the Court may seem meet and proper.

Frank D. Reeves, 1901 11th Street, N. W., Washington, D. C.; Thurgood Marshall, Robert L. Carter, 20 West 40th Street, New York 18, New York, Attorneys for Petitioner.

[fol. 7] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISCHARGE THE RULE TO SHOW CAUSE AND DISMISS THE PETITION FOR WRIT OF HABEAS CORPUS

Comes now the respondents, Robert A. Lovett, Secretary of Defense; Thomas K. Finletter, Secretary of the Air

Force; and General Hoyt S. Vandenberg, Chief of Staff, United States Air Force, and by their attorneys move to discharge the rule to show cause and dismiss the petition filed herein because the petition fails to state a claim upon which relief can be granted as hereinafter more specifically indicated.

1. The petition raises no questions reviewable by this court inasmuch as it fails to allege that the court-martial was improperly constituted, that the court-martial was without jurisdiction over the offenses and the petitioner or that the sentence adjudged by the court-martial was unauthorized by law.[1]

2. By habeas corpus the civil courts may exercise no supervisory or correcting power over the proceedings of a court-martial. The single inquiry, the test, is jurisdiction.[2]

3. In this case, the court-martial was lawfully constituted, had jurisdiction of the petitioner and the offenses charged, and acted within its lawful powers in adjudging the sentence. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.[3]

[fol. 8] 4. The court-martial proceedings have been extensively reviewed in accordance with the Articles of War and the Manual for Courts-Martial, 1949. The petitioner was tried on May 27, 28, and 30, 1949, at Headquarters, 19th Bombardment Wing, Medium, APO 334, by a general court-martial lawfully appointed by the Commanding General, Twentieth Air Force. The petitioner was charged with rape and murder of one Ruth Farnsworth, in violation of the

---

[1] Hiatt v. Brown, 339 U.S. 103, 94 L. ed. 691, 70 S. Ct. 495, rehearing denied, 339 U.S. 939, 94 L. ed. 1356, 70 S. Ct. 672 (1950).

[2] Hiatt v. Brown, supra, 339 U.S. at 111; United States v. Grimley, 137 U.S. 147, 150, 34 L. ed. 636, 637, 11 S. Ct. 54 (1890).

[3] Hiatt v. Brown, supra; Re Yamashita, 327 U.S. 1, 8, 9, 90 L. ed. 499, 505, 506, 66 S. Ct. 340 (1946); Swaim v. United States, 165 U.S. 553, 562, 41 L. ed. 823, 17 S. Ct. 448 (1897).

92nd Article of War (10 USC 1564), found guilty of both offenses and sentenced to death. The record of trial, a copy of which has been filed with the petition for writ of habeas corpus in this action, was reviewed by the Staff Judge Advocate, Twentieth Air Force, in accordance with the provisions of Article of War 47 (10 USC 1518), and after said review the sentence was approved by the receiving authority, the Commanding General, Twentieth Air Force. A copy of the review of the Staff Judge Advocate and the approving action of the reviewing authority are attached hereto as Exhibits "A" and "B" respectively and these Exhibits as well as Exhibits "C", "D", "E", "F", and "G" hereinafter referred to are by reference made a part hereof as fully as though rewritten herein. The record of trial was then forwarded to the Office of The Judge Advocate General, United States Air Force, for review by a Board of Review pursuant to the provisions of Article of War 50 (10 USC 1521). After comprehensive consideration of the record of trial by the Board of Review, which review included submission of brief and argument by the attorney for petitioner before the Board, the Board of Review on March 14, 1950, held the record of trial legally sufficient to support the findings of guilty and the sentence and to warrant the confirmation thereof. (A copy of the opinion of the Board of Review is attached hereto, marked Exhibit "C"). The record of trial was then reviewed by the Judicial Council, Office of The Judge Advocate General, United States Air Force, pursuant to the provisions of Article of War 48 (10 USC 1519) and 50 (10 USC 1521) which review included submission of brief and oral argument by the attorney for petitioner. The Judicial [fol. 9] Council, on August 18, 1950, held the record of trial legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof, and submitted its opinion, (a copy of which is appended as Exhibit "D") to The Judge Advocate General, United States Air Force. On November 14, 1950, pursuant to the provisions of Article of War 50 (10 USC 1521) the record of trial, the opinions of the Board of Review and of the Judicial Council, and the recommendations of The Judge Advocate General, United States Air Force, (a copy of the latter is at-

tached hereto as Exhibit "E") were transmitted to the Secretary of the Air Force for the action of the President. On August 3, 1951, the death sentence was confirmed by the President pursuant to the provisions of Article of War 48 (10 USC 1519) and ordered to be carried into execution. A copy of the Action by the President is appended hereto as Exhibit "F". By petition of August 31, 1951, to The Judge Advocate General, United States Air Force, the petitioner requested any and all relief afforded by Article of War 53 (10 USC 1525) (Now Section 12, Act of 5 May 1950). In support of such petition were raised allegations similar to those presented in the petition for habeas corpus. The Judge Advocate General appointed a board of officers to hear argument by counsel for petitioner, consider all evidence, and make recommendations. After re-examination by The Judge Advocate General, United States Air Force, of the entire record of trial and the independent investigations conducted at his request in the light of the grounds set forth in the petition, The Judge Advocate General, United States Air Force, denied the application for relief on January 28, 1952. A copy of his action and the Memorandum of Opinion relative to the denial of such relief is appended hereto as Exhibit "G".

Charles M. Irelan, United States Attorney, Washington, D. C.; B. M. Landesman, Assistant United States Attorney, Washington, D. C., Attorneys for Respondents.

Of Counsel, Walter Kiechel, Jr. Lieutenant Colonel, USAF, Office of The Judge Advocate General, USAF, Washington, D. C.

[fol. 10] IN THE UNITED STATES DISTRICT COURT

No. —

HERMAN P. DENNIS, JR., Petitioner,

v.

ROBERT A. LOVETT, Secretary of Defense; THOMAS K. FINLETTER, Secretary of the Air Force; GENERAL HOYT S. VANDENBERG, Chief of Staff, United States Air Force

PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court for the District of Columbia

Comes now petitioner, Herman P. Dennis, Jr., by his attorneys, Frank D. Reeves, Thurgood Marshall and Robert L. Carter, and respectfully shows that:

1. He is a Negro, a citizen of the United States and a member of the United States Air Force, AF 18 101 483. At the time of his court-martial conviction, which is assailed herein, he was stationed on the island of Guam, an insular possession of the United States, as a private in the 12th Air Ammunition Squadron, APO 264.

2. He is unjustly and unlawfully detained and imprisoned by color of authority of the United States, in the custody of Headquarters of the Japan Logistical Command, APO 503. Said Command is under the authority of, and responsible to, Robert A. Lovett, Secretary of Defense; Thomas K. Finletter, Secretary of the Air Force; and General Hoyt S. Vandenberg, Chief of Staff, United States Air Force, all of whom are within the jurisdiction of the United States District Court for the District of Columbia.

[fol. 11] 3. The cause or pretext of such detention is by virtue of a trial by general court-martial on May 9-16, 1949, at Headquarters, 20th Air Force APO 234, where the petitioner was charged with murder and rape in violation of Article of War 92. This trial resulted in the petitioner's conviction and sentence of death. The court-martial proceedings were approved by the reviewing authority, and the

record forwarded to Washington for appellate review in the office of the Judge Advocate General, United States Air Force. On November 29, 1949, a Board of Review, and on July 15, 1950, the Judicial Council, 4 Court-Martial Reports (AF)872, found the conviction and sentence legally sufficient and recommended confirmation. The Judge Advocate General concurred in these conclusions, and on August 3, 1951, the conviction and sentence was confirmed and ordered executed by the President, pursuant to Article of War 38. Petitioner made application to the Judge Advocate General for a new trial, pursuant to Section 12, Act of May 5, 1950 (formerly Article of War 53), and on January 28, 1952, this petition was denied. Petitioner has exhausted all available remedies in the military establishment, and his only recourse is now to seek redress in this Court by way of this petition.

4. All of said actions resulting in the continuing restraint and imprisonment of your petitioner are illegal and in violation of the Constitution of the United States and the Fifth Amendment thereof, in that the original alleged conviction and sentence by court-martial was beyond the jurisdiction and lawful authority of the United States Air Force and secured in a manner violative of petitioner's rights as a citizen of the United States, as a member of the United States Air Force and as a person subject to laws and regulations of an insular possession of the United States and are without authority and void.

5. On December 11, 1948, Ruth Fransworth, a white civilian worker on Guam, was found missing under circumstances leading to the belief that a crime had been com- [fol. 12] mitted. On December 13, she was found in a wooded area near the place where she worked. She was unconscious and in a critical condition. As a result of medical examination, it was concluded that she had been raped and beaten. She was taken to a hospital and on December 14 she died without recovering consciousness.

6. On January 7, 1949, petitioner was arrested without being informed of the charges against him (R. 218, 226) and detained by police authorities on the island of Guam, a United States possession under American sovereignty. These police authorities were officers and men of the United

States Navy and subject to the orders of the President of the United States and his appointees. Petitioner was held until January 17, 1949, before being arraigned by any authority (R. 227). He was held incommunicado without process, (R. 193-4, 203-4, 214, 221, 244, Affidavit of Edward Daly filed herewith as Exhibit C, and Affidavit of E. E. Grimmett filed herewith as Exhibit A) subjected to continuous questioning, (R. 197, 228, 240-2, Exhibit A, C and Affidavit of petitioner filed herewith as Exhibit B), beaten, (Exhibits B, C, and Affidavit of Mary L. Hill filed herewith as Exhibit F) denied sleep and food (Exhibit A) and placed in solitary confinement (R. 193-4, 203-4, 214, 221, 244, Exhibits A and C). He was not allowed to consult counsel despite his requests during the entire time he was held in custody by the authorities of Guam (R. 232, Exhibits A, C). On or about January 29, 1949, petitioner was returned by the authorities of Guam to the custody of Headquarters, 20th Air Force, APO 234 (R. 331). On February 1, 1949, charges against the petitioner were filed by the Air Force. After an investigation by military authorities the case was referred for trial on March 21, 1949. Amended charges were filed on April 14, 1949. Defense attorneys were not appointed until April 8, 1949, and petitioner did not have the opportunity to receive advice of counsel until shortly before his trial convened on May 9, 1949 (Exhibit C).

[fol. 13] 7. During the period of his detention by the naval authorities on Guam, petitioner without being adequately advised of his rights, (R. 213, 219-23, 227-7), 242-3, 254, 279, Exhibits A, C, F) as required under Article of War 24 and the Fifth Amendment to the Constitution of the United States, made four confessions to the police authorities on or about January 11, 12 and 13th. These confessions were the result of physical duress, protracted interrogation, the use of a lie detector, threats that if he did not confess, he would receive the death sentence, promises of leniency and special consideration if he did confess and the use of various subterfuges (R. 188-198, 210 ff, 236-8, 239 ff, Exhibits A, C, B, F). Petitioner was also told what to say in his confessions (R. 191-2, 210, 243, Exhibit B and Affidavit of petitioner filed herein as Exhibit G) and subsequently both before and at his trial all of his confessions were repudiated

(R. 250-1, 262-3). In addition, on or about January 8, 1949, petitioner without being advised of his constitutional rights against self-incrimination had taken from his person certain pubic hairs which were subsequently used as evidence against him (R. 161, Exhibit B).

8. Prior to his trial petitioner's request for counsel of his choice was denied and the counsel that he sought was not made available to him (R. 3-5, Exhibits A, B, C, B). Although petitioner concedes that discretion exists on the part of court-martial authorities to control the choice of defense counsel, petitioner alleges that this denial was a serious abuse of discretion (Exhibits A, B, C, F).

9. Petitioner was arrested, detained, interrogated, intimidated and coerced confession were procured from him, in violation of the Penal Code of Guam in force in January 1949, namely Section 686, 825 and 1473 thereof, and the Bill of Rights of Guam filed as Appendix hereto and the Constitution of the United States. The fruits of these unlawful activities were used by the United States Air Force against petitioner in his trial by general court-martial in violation of his rights under the Constitution of the United States and [fol. 14] the Articles of War. At the trial of petitioner, evidence was improperly introduced in the record, statements allegedly made voluntarily but actually made under severe mental and physical duress and certain prejudicial statements were introduced into the record that were irrelevant, immaterial, inflammatory and calculated to prejudice petitioner's cause (R. 77-9).

10. The prosecution was so intent upon securing a conviction of your petitioner despite that knowledge of his lack of guilt that they suppressed important evidence tending to show his innocence, (Exhibits A, Affidavit of Edward Daly filed as Exhibit D, and F) sought to procure witnesses to perjure themselves (Exhibits A, C, F) and intimidated and threatened those who sought to help your petitioner (Exhibit A, C, F). This was in violation of the duty of the Trial Judge Advocate to see that petitioner was dealt with fairly (Manual for Court Martials, Paragraph 41 d). Defense counsel was not given or did not take adequate time to prepare and present petitioner's case. The atmosphere

surrounding the trial was one of hysteria and terror created by the naval authorities governing Guam and the Authorities commanding the United States Air Forces (R. 207, Exhibits A, C, F). Petitioner further alleges that specimens of his pubic hair procured from him were deliberately planted in an effort to create evidence tending to show his guilt (Exhibit B). This allegation is corroborated by the prosecution's introduction of a smock and scrapings allegedly containing petitioner's pubic hairs taken almost a month later from the truck allegedly used the night of the crime (R. 207 ff). This evidence is introduced despite testimony that the truck was washed and cleaned regularly in the interim (F. 3-3 ff). Inasmuch as witnesses clearly placed petitioner elsewhere at the time of his alleged crime (R. 287 ff) and in the face of the prosecution's case which relied almost exclusively upon a repudiated coerced confession and circumstantial evidence which staggers credulity, the only conclusion that can be drawn is that petitioner's con-[fol. 15] viction was a denial of his constitutional right to a fundamentally fair trial, because of the bias, prejudice and vindictiveness of the prosecution and the court that tried and convicted him.

11. Inasmuch as your petitioner was arrested and interrogated in violation of the then Penal Code of Guam governing criminal procedure, namely Sections 686, 780 and 825 and the Bill of Rights of the Island of Guam, and since Guam is an insular possession of the United States, than governed under the authority of the United States government by United States naval personnel, and since the legal protections afforded by the Guam Code were applicable to your petitioner, his original arrest and detention were unlawful by the laws of Guam and violative of the United States Constitution; and he should then have been released; that any further proceedings against your petitioner by another agency of the United States, the United States Air Force, was illegal, unconstitutional and devoid of jurisdiction.

12. The trial of your petitioner was without jurisdiction in that it was in violation of the Statutes and Constitution of the United States and in contravention of Articles of

War 17, Title 10, United States Code, Section 1488 (counsel of his c-oice), 24, Title 10, United States Code, Section 1495 (compulsory self-incrimination prohibited), and 70, Title 10, United States Code, Section 1542 (undue confinement).

13. The trial of your petitioner was in violation of his constitutional rights as an American citizen in that it was conducted with disregard to the Fifth and Sixth Amendments to the United States Constitution.

14. The cumulative effect of all of the above-stated violations was to prevent petitioner from being afforded due process and a fair trial, thereby rendering his conviction and sentence wholly unconstitutional and void.

15. The general court-martial which tried petitioner lacked jurisdiction to try, convict and sentence him. The actual trial and the atmosphere in which it was conducted [fol. 16] violated his rights to due process of law as secured by the Constitution of the United States, and petitioner's conviction, sentence and present detention are therefore unconstitutional, null, void and of — effect.

Wherefore, your petitioner prays:

1. That a writ of habeas corpus issue out of this Court directed to Robert A. Lovett, Secretary of Defense; Thomas K. Finletter, Secretary of the Air Force; General Hoyt S. Vandenberg, Chief of Staff, United States Air Force; or some person and persons acting in their place and stead, requiring them to order Headquarters, Japan Logistical Command to produce the body of your petitioner before this Court at some time convenient to be designated, to abide by what shall be awarded by the Court in the premises, to discharge your petitioner from said imprisonment, and for all general and equitable relief.

2. That in the alternative, a rule to show cause why such writ should not be issued directed to said respondents be granted herein.

3. That a hearing be had before this Court to inquire into and determine the legality of said detention and that pending said hearing, said respondents, and each of them, be required to stay execution of the sentence of death against the petitioner.

4. That upon final hearing, petitioner may be discharged from said custody.

5. For other and further relief as to the Court may seem meet and proper.

Frank D. Reeves, 1901 11th Street, N.W., Washington, D.C. Thurgood Marshall, Robert L. Carter, 20 West 40th Street, New York 18, New York, Attorneys for Petitioner.

[fol. 17] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISCHARGE THE RULE TO SHOW CAUSE AND DISMISS THE PETITION FOR WRIT OF HABEAS CORPUS—February 8, 1952

Comes now the respondents, Robert A. Lovett, Secretary of Defense; Thomas K. Finletter, Secretary of the Air Force; and General Hoyt S. Vandenberg, Chief of Staff, United States Air Force, and by their attorneys move to discharge the rule to show cause and dismiss the petition filed herein because the petition fails to state a claim upon which relief can be granted as hereinafter more specifically indicated:

1. The petition raises no questions reviewable by this court inasmuch as it fails to allege that the court-martial was improperly constituted, that the court-martial was without jurisdiction over the offenses and the petitioner or that the sentence adjudged by the court-martial was unauthorized by law.[1]

2. By habeas corpus the civil courts may exercise no supervisory or correcting power over the proceedings of a [fol. 18] court-martial. The single inquiry, the test, is jurisdiction.[2]

---

[1] Hiatt v. Brown, 339 U. S. 103, 94 L. ed. 691, 70 S. Ct. 495, rehearing denied, 339 U. S. 939, 94 L. ed. 1356, 70 S. Ct. 672 (1950).

[2] Hiatt v. Brown, *supra*, 339 U. S. at 111; United States v. Grimley, 137 U. S. 147, 150, 34 L. ed. 636, 637, 11 S. Ct. 54 (1890).

3. In this case, the court-martial was lawfully constituted, had jurisdiction of the petitioner and the offenses charged, and acted within its lawful powers in adjudging the sentence. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.[3]

4. The court-martial proceedings have been extensively reviewed in accordance with the Articles of War and the Manual for Courts-Martial, 1949. The petitioner was tried on May 9, 11, 12, 13, 14, and 16, 1949, at Headquarters, Twentieth Air Force, APO 234, by a general court-martial lawfully appointed by the Commanding General, Twentieth Air Force. The petitioner was charged with rape and murder of one Ruth Farnsworth, in violation of the 92nd Article of War (10 USC 1564), found guilty of both offenses and sentenced to death. The record of trial, a copy of which has been filed with the petition for writ of habeas corpus in this action, was reviewed by the Staff Judge Advocate, Twentieth Air Force in accordance with the provisions of Article of War 47 (10 USC 1518), and after said review the sentence was approved by the reviewing authority, the Commanding General, Twentieth Air Force. A copy of the review of the Staff Judge Advocate and the approving action of the reviewing authority are attached hereto as Exhibits "A" and "B" respectively and these Exhibits as well as Exhibits "C", "D", "E", "F" and "G" hereinafter referred to are by reference made a part hereof as fully as though rewritten herein. The record of trial was then forwarded to the Office of The Judge Advocate General, United [fol. 19] States Air Force, for review by a Board of Review pursuant to the provisions of Article of War 50 (10 USC 1521). After comprehensive consideration of the record of trial by the Board of Review, which review included submission of brief and oral argument by the attorney for petitioner before the Board, the Board of Review on November 21, 1949, held the record of trial legally sufficient to

---

[3] Hiatt v. Brown, *supra;* Re Yamashita, 327 U. S. 1, 8, 9, 90 L. ed. 499, 505, 506, 66 S. Ct. 340 (1946); Swaim v. United States, 165 U. S. 553, 562, 41 L. ed. 823, 17 S. Ct. 448 (1897).

support the findings of guilty and the sentence. (A copy of the opinion of the Board of Review is attached hereto, marked Exhibit "C"). The record of trial was then reviewed by the Judicial Council, Office of The Judge Advocate General, United States Air Force, pursuant to the provisions of Articles of War 48 (10 USC 1519) and 50 (10 USC 1521) which review included submission of brief and oral argument by the attorney for petitioner. The Judicial Council, on July 18, 1950, held the record of trial legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof and submitted its opinion (a copy of which is appended as Exhibit "D") to The Judge Advocate General, United States Air Force. On November 14, 1950, pursuant to the provisions of Article of War 50 (10 USC 1521) the record of trial, the opinions of the Board of Review and of the Judicial Council and the recommendations of The Judge Advocate General, United States Air Force (a copy of the latter is attached hereto as Exhibit "E") were transmitted to the Secretary of the Air Force for the action of the President. On August 3, 1951, the death sentence was confirmed by the President pursuant to the provisions of Article of War 48 (10 USC 1519) and ordered to be carried into execution. A copy of the Action by the President is appended hereto as Exhibit "F". By petition of August 31, 1951, to The Judge Advocate General, United States Air Force, the petitioner requested any and all relief afforded by Article of War 53 (10 USC 1525) (Now Section 12, Act of 5 May 1950). In support of such petition were raised allegations similar to those presented in the petition for habeas corpus. The Judge Advocate General appointed a board of officers to [fol. 20] hear argument by counsel for petitioner, consider all evidence, and make recommendations. After re-examination by The Judge Advocate General, United States Air Force, of the entire record of trial and the independent investigations conducted at his request in the light of the grounds set forth in the petition, The Judge Advocate General, United States Air Force, denied the application for relief on January 28, 1952. A copy of his Action and the

Memorandum of Opinion relative to the denial of such relief is appended hereto as Exhibit "G".

Charles M. Irelan, United States Attorney, Washington, D. C.; B. M. Landesman, Assistant United States Attorney, Washington, D. C., Attorneys for Respondents.

Of Counsel: Walter Kiechel, Jr., Lieutenant Colonel, USAF, Office of The Judge Advocate General, USAF, Washington, D. C.

[fol. 21] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION—April 10, 1952

MORRIS, J.:

This petition for a writ of habeas corpus was filed, seeking the release of the petitioner, who is held under authority of the respondents by the Japan Logistical Command, awaiting execution of sentence of death pursuant to a conviction by a general court martial for the rape and murder of one Ruth Farnsworth, in violation of the 92nd Article of War, in Guam, on or about the 11th day of December 1948. The petitioner at the times relevant to these proceedings was a Staff Sergeant of the 12th Air Ammunition Squadron. The general court martial, before which he was tried, was lawfully appointed by the Commanding General, 20th Air Force. It is, therefore, not controverted that the general court martial trying this petitioner had jurisdiction of the petitioner and of the offense, and it is clear that the sentence imposed was such as is authorized by the Articles of War. It is contended by the petitioner, however, that gross irregularities and improper and unlawful practices rendered the trial and conviction invalid, and that this Court, on a writ of habeas corpus, should review the proceedings, determine the invalidity thereof, and release the petitioner from custody.

As stated in the memorandum opinion in the case of *Herman P. Dennis, Jr.* v. *Robert A. Loveti, et al.*, Habeas

Corpus No. 3872, decided this date, the conclusions of this Court are:

> It is for this Court, on a petition for a writ of habeas corpus, only to inquire into and determine whether or not the court martial before which a petitioner is tried was lawfully constituted, had jurisdiction of the person and offense, and imposed a sentence authorized [fol. 22] by law. Beyond that the civil courts should not and cannot go. The Congress has constituted the system by which military law shall be administered, and it is not given to the civil courts, beyond the jurisdiction of a military court, to inquire into the regularity of its proceedings for the correction of errors committed therein. *Hiatt* v. *Brown*, 339 U. S. 103, decided March 13, 1950. The proceedings of the court martial in this case was considered and approved by the reviewing authority, which was accomplished by a full analysis of the proceedings by the Staff Judge Advocate of the Headquarters of the 20th Air Force. Thereafter a subsequent review was had by the Board of Review, and thereafter a further review was had by the Judicial Council. Subsequently a review was had by the Judge Advocate General, United States Air Force, who, because of the extreme gravity of both the sentence adjudged and the allegations made, in his capacity as supervisor of the administration of military justice generally, caused the Office of Special Investigations, Office of the Inspector General, to make a complete investigation of such matters. As the approval of the President of the United States was necessary to carry such sentence into effect, that action was also had. Thereafter, upon the application of petitioner for relief provided by Section 12, Act of May 12, 1950 (formerly Article of War 53), the Judge Advocate General, United States Air Force, caused a board of officers to be appointed to provide for a hearing, which was afforded to counsel for petitioner. All of this extensive machinery for review was intended to afford adequate opportunity for the correction of any errors prejudicial to the petitioner committed in the trial of his case. The record here shows that extensive

consideration was given to each of the matters asserted in support of the relief sought in these proceedings, and the various military authorities who were charged with the responsibility of review determined such matters to be factually groundless. In these circumstances, this Court is without jurisdiction to inquire into the matters and things asserted by the petitioner to be grounds for the relief sought, and, therefore, the petition does not state facts upon which the relief sought can be granted.

For the reasons stated, as sought by the respondents in response to a rule to show cause issued herein, the rule to show cause is discharged and the petition for a writ of habeas corpus is dismissed.

——— ———, Judge.

[fol. 23] In United States District Court

[Title omitted]

Order

This cause coming on for consideration on a petition for writ of habeas corpus, and the Court having considered the petition and memorandum of points and authorities in support thereof, the rule directing the respondents to show cause why a writ should not issue, the respondents' motion to discharge the rule to show cause and dismiss the petition for writ of habeas corpus and memorandum of authorities in support thereof, and the oral argument had by counsel before the Court on the respondents' motion to discharge the rule to show cause and dismiss the petition for writ of habeas corpus, and it appearing to the Court that the petition does not state facts upon which the relief sought can be granted, it is this — day of April, 1952,

Ordered, that the respondents' motion be granted, the rule to show cause be discharged, and the petition for writ of habeas corpus be, and hereby is, dismissed.

———, Judge.

[fol. 24] Minute Entry of Argument and Submission, June 18, 1952, omitted in printing.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11419

ROBERT W. BURNS, APPELLANT

v.

ROBERT A. LOVETT, Secretary of Defense, et al., APPELLEES

No. 11420

HERMAN P. DENNIS, JR., APPELLANT

v.

ROBERT A. LOVETT, Secretary of Defense, et al., APPELLEES

Appeals from the United States District Court for the District of Columbia

---

Decided July 31, 1952

Mr. Robert L. Carter, pro hac vice, by special leave of Court, and *Mr. Frank D. Reeves* for appellants.

Lieutenant Colonel Walter Kiechel, Jr., Office of the Judge Advocate General, United States Air Force, and *Mr. Joseph M. Howard,* Assistant United States Attorney, with whom *Mr. Charles M. Irelan,* United States Attorney, and *Mr. B. M. Landesman,* Assistant United States Attorney, were on the brief, for appellees.

Before PRETTYMAN, PROCTOR and BAZELON, Circuit Judges.

PRETTYMAN, *Circuit Judge*: These are appeals from denials by the District Court of petitions for writs of *habeas corpus*. Appellants were members of American armed forces on the Island of Guam. They were convicted by courts-martial of murder and rape and were sentenced to death. The convictions and sentences having been approved by the reviewing authorities, including the President, they filed petitions for *habeas corpus*. The records of the trials by the courts-martial were filed by petitioners at the same time with the court. Attached to the petitions were several affidavits and extracts from the penal code of Guam. The court issued rules to show cause, and the respondent officials filed motions to dismiss the petitions and to discharge the rules, attaching to those motions copies of the findings and opinions of the several reviewing authorities. The court held that the petitions did not recite facts upon which the relief sought could be granted and therefore discharged the rules and dismissed the petitions. In this court the cases were consolidated for hearing and decision. Appellants are presently confined in the custody of Headquarters of the Japan Logistical Command.

A civilian girl Government employee at a store on the Island of Guam was brutally raped and murdered. In the course of the ensuing investigation lie detector tests were given, upon their consent, to many members of the American armed forces in the vicinity. What transpired at these tests is not reported in the papers before us, but immediately thereafter certain physical evidence was uncovered and three soldiers, these appellants and one Calvin Dennis, were taken into custody and delivered to the civil authorities of Guam, who were American naval officers and men. They were detained in this custody from January 7, 1949, to January 30, 1949, when they were

delivered to the military authorities. They were tried separately, the trials of appellants being May 9-16 and May 26-30. Several alleged confessions of Herman Dennis were presented at his trial. Calvin Dennis was the principal witness for the prosecution at the trial of Burns. Other testimony and physical evidence of various sorts were presented. The convictions were reviewed by the Board of Review in the Office of the Judge Advocate General, United States Air Force, and by the Judicial Council, both of which rendered long, written opinions. The records and extensive correspondence relating to the cases were reviewed by the Judge Advocate General, United States Air Force, and he wrote memoranda of his conclusions to the Secretary of the Air Force. Thereafter the President confirmed the sentences. The executions were stayed pending these proceedings.

The controversy presents a problem of jurisdiction. The question is whether the allegations of the petitions, viewed in the light of the accompanying data and of the returns to the rules,[1] are sufficient to invoke the jurisdiction of the court and to require a hearing on the merits.

Our first inquiry concerns the authority of courts to review courts-martial. The Constitution, in Article I, Section 8, Clause 14, confers upon the Congress power "To make rules for the government and regulation of the land and naval forces". Congress has done so. Those rules relating to trials for offenses were the Articles of War[2] now superseded by the Uniform Code of

---

[1] Walker v. Johnston, 312 U.S. 275, 284, 85 L.Ed. 830, 61 S.Ct. 574 (1941); *In re* Yamashita, 327 U.S. 1, 90 L.Ed. 499, 66 S.Ct. 340 (1946); Palmer v. Ashe, 342 U.S. 134, 96 L.Ed. __, 72 S.Ct. 191 (1951); Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (1945), *cert. denied*, 325 U.S. 890, 89 L.Ed. 2003, 65 S.Ct. 1580 (1945). See Reviser's Note to 28 U.S.C.A. § 2243; United States v. Hayman, 342 U.S. 205, 222-223, 96 L.Ed. __, 72 S.Ct. 263 (1952).

[2] 41 STAT. 787 (1920), 10 U.S.C.A. § 1471 *et seq.*

Military Justice.[3] They provide for trial procedure and review procedure.[4] This power of the Congress and the judicial power, both established by the Constitution, are separate powers.[5] Based upon the constitutional power of the Congress over the armed forces, the courts have held uniformly, from the earliest time down to a decision as late as 1950, that the power of courts is limited to a consideration of the "jurisdiction" of courts-martial, and they have no power of review.[6] In the *Yamashita* case[7] the Supreme Court said:

---

[3] 64 STAT. 108 (1950), 50 U.S.C.A. § 551 *et seq.*

[4] 41 STAT. 797 (1920), 10 U.S.C.A. § 1522; 64 STAT. 128 (1950), 50 U.S.C.A. § 653.

[5] Dynes v. Hoover, 20 How. (61 U.S.) 65, 15 L.Ed. 838 (1858); Carter v. Woodring, 67 App. D.C. 393, 92 F.2d 544 (1937), *cert. denied*, 302 U.S. 752, 82 L.Ed. 582, 58 S.Ct. 283 (1937); United States v. McDonald, 265 Fed. 754 (E.D. N.Y. 1920), *appeal dismissed*, 256 U.S. 705, 65 L.Ed. 1180, 41 S.Ct. 535 (1921); *Ex parte* Potens, 63 F.Supp. 582 (E.D. Wis. 1945).

[6] Whelchel v. McDonald, 340 U.S. 122, 95 L.Ed. 141, 71 S.Ct. 146 (1950); Hiatt v. Brown, 339 U.S. 103, 94 L.Ed. 691, 70 S.Ct. 495 (1950); Dynes v. Hoover, 20 How. (61 U.S.) 65, 15 L.Ed. 838 (1858); Johnson v. Sayre, 158 U.S. 109, 39 L.Ed. 914, 15 S.Ct. 773 (1895); Mullan v. United States, 212 U.S. 516, 53 L.Ed. 632, 29 S.Ct. 330 (1909); United States v. Grimley, 137 U.S. 147, 34 L.Ed. 636, 11 S.Ct. 54 (1890); McClaughry v. Deming, 186 U.S. 49, 69, 46 L.Ed. 1049, 1057-1058, 22 S.Ct. 786 (1902); *Ex parte* Reed, 100 U.S. 13, 23, 25 L.Ed. 538, 539 (1879); Carter v. McClaughry, 183 U.S. 365, 392-401, 46 L.Ed. 236, 250-253, 22 S.Ct. 181 (1902); Swaim v. United States, 165 U.S. 553, 41 L.Ed. 823, 17 S.Ct. 448 (1897); Note, 20 L.R.A. (N.S.) 413. See also *Ex parte* Milligan, 4 Wall. (71 U.S.) 2, 18 L.Ed. 281 (1866).

[7] *In re* Yamashita, 327 U.S. 1, 8, 90 L.Ed. 499, 66 S.Ct. 340, (1946).

> "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."

And in *Hiatt* v. *Brown*[8] the Court said:

> "It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . The single inquiry, the test, is jurisdiction.' *In re Grimley*, 137 U. S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."

Appellants say that recent decisions of the Supreme Court have expanded the concept of "jurisdiction" for purposes of determining the right to *habeas corpus*. That is correct. In *Whelchel* v. *McDonald*[9] the Court clearly intimated, if it did not expressly say, that a denial to an accused of an opportunity to tender an issue of insanity would go to the question of the jurisdiction of a court-martial. *Habeas corpus* has been held to lie in criminal cases in the courts where there has been a denial of counsel,[10] a coerced plea of guilty,[11] a deliberate suppres-

---

[8] 339 U.S. 103, 111, 94 L.Ed. 691, 70 S.Ct. 495 (1950).

[9] 340 U.S. 122, 95 L.Ed. 141, 71 S.Ct. 146 (1950).

[10] Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938).

[11] Walker v. Johnston, 312 U.S. 275, 85 L.Ed. 830, 61 S.Ct. 574 (1941); Von Moltke v. Gillies, 332 U.S. 708, 92 L.Ed. 309, 68 S.Ct. 316 (1948).

sion of favorable evidence,[12] mob hysteria,[13] double jeopardy.[14] We recently reviewed the problem in *Smith* v. *United States*.[15]

The Supreme Court seemed, in *Hiatt* v. *Brown, supra*, to revert to earlier concepts of jurisdiction in considering the power of courts over courts-martial. It cited In re *Grimley*. At the same time it used the expression "acted within its lawful powers." That expression seems to imply a scope of review broader than a technical "jurisdiction".

In its brief the Government contented itself with support of its ultimate conclusion, without attempting to establish premises, but in oral argument its counsel took the position that persons in the armed forces are not protected by the due process clause. For that position he relied upon *Johnson* v. *Eisentrager*.[16] It is true that in the opinion in that case the Supreme Court said, "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights . . ."[17] There are also several expressions in Ex parte *Quirin*[18] which seem to imply that the exception of "cases

---

[12] Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942).

[13] Moore v. Dempsey, 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265 (1923).

[14] *Ex parte* Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889).

[15] 88 U.S. App. D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927, 95 L.Ed. 1358, 71 S.Ct. 792 (1951). See also Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

[16] 339 U.S. 763, 94 L.Ed. 1255, 70 S.Ct. 936 (1950).

[17] *Id.*, 339 U.S. at 783.

[18] 317 U.S. 1, 87 L.Ed. 3, 63 S.Ct. 1 (1942).

arising in the land or naval forces" applies to the whole of both the Fifth and the Sixth Amendments. There is also the sweeping statement, "We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission . . ."[19] In the opinion of Chief Justice Chase in Ex parte *Milligan*[20] is the statement, "We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment." Again there is a sweeping statement by the Court of Appeals for the Second Circuit that "The Fifth and Sixth Amendments are, of course, inapplicable to a court-martial. Ex parte Quirin et al., supra."[21]

But we think those expressions must be read in context. The *Eisentrager* case concerned enemy aliens. In the expression quoted, the Court cited *Wade* v. *Hunter*,[22] which concerned double jeopardy, itself a Fifth Amendment protection, in court-martial proceedings. In that case (*Wade* v. *Hunter*) the Court recited the rule of the *Perez* case,[23] applicable to federal courts upon the discontinuing of criminal trials once begun, and then said:

> "We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the Fifth Amendment's provision against double jeopardy. Measured by the *Perez*

---

[19] *Id.*, 317 U.S. at 45.

[20] 4 Wall. (71 U.S.) 2, 138, 18 L.Ed. 281, 301 (1866).

[21] Innes v. Crystal, 131 F.2d 576, 577, n. 2 (2d Cir. 1943), *cert. denied as moot*, 319 U.S. 795, 87 L.Ed. 1708, 63 S.Ct. 1164 (1943).

[22] 336 U.S. 684, 93 L.Ed. 974, 69 S.Ct. 834 (1949).

[23] United States v. Perez, 9 Wheat. (22 U.S.) 579, 6 L.Ed. 165 (1824).

rule to which we adhere, petitioner's second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment."[24]

In the *Quirin* case, *supra*, the Court was discussing the right of trial by jury and indictment by grand jury. The indictment clause of the Fifth Amendment contains a specific exception of "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger". And, as to trial by jury, the Court held, in an extended discussion, that the Sixth Amendment protection of this right does not extend to cases not subject to such trials at the common law. It seems to us that the language and thought in *Quirin* was directed to whether the rights there involved (indictment and trial by jury) were discretionary under the power conferred upon the Congress by Article I or were within the requirements of the Fifth and Sixth Amendments. We do not read the case as holding that all the rights covered by the Amendments, including the right of due process of law, were abrogated by the clause empowering Congress to make rules for the armed forces.

In Ex parte *Milligan*, *supra*, the Court was dealing with a civilian, and the quoted observation of the Chief Justice was directly related to the meaning of the expressed exception in the Fifth Amendment. The language quoted from *Innes* v. *Crystal*[25] was used in a footnote to a case which dealt with errors not going to the jurisdiction of the court-martial. We do not read it as intended to be a blanket denial of all Fifth and Sixth Amendment rights. When the Supreme Court declared the case moot and the petition was presented to the Third Circuit, that court unequivocally declared petitioner's right to due process.[26]

---

[24] *Supra* note 22, 336 U.S. at 690.

[25] *Supra* note 21.

[26] United States v. Hiatt, 141 F.2d 664 (3d Cir. 1944).

Upon elementary reasoning, upon the language and structure of the Constitution, and upon authority, we think men accused before courts-martial are entitled to due process of law. It is an elementary precept in our concept of law and government that a human being has an inherent right to due process of law. The power of the Congress to make rules for the armed forces is one of a long list (eighteen, to be exact) of powers conferred in Section 8 of Article I upon the Congress. We find no intimation in the Constitution itself that Clause 14 of Section 8 of Article I and proceedings pursuant thereto are exempt from the requirements and prohibitions of the Fifth and Sixth Amendments. We think those Amendments apply to each and all of the powers of the Congress, to the 14th Clause of Section 8 as well as to the other seventeen clauses, and to all acts of executive officials under Article II and to judicial proceedings under the power conferred by Article III, except when an exception is stated in the Constitution itself. Moreover, the text of the Fifth Amendment supports this view. It reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

It seems to us to be clear upon the face of the text that the specific exception of cases arising in the land or naval forces from the first clause, relating to indictment before prosecution, conclusively shows that the exception does not apply to the other clauses. As we have already pointed

out, the Supreme Court has definitely indicated that the double jeopardy clause applies to courts-martial.

There is a wealth of authority to support the view that due process applies to courts-martial. The Supreme Court so indicated in *Hiatt* v. *Brown* when it said:

> "We think the court was in error in extending its review, *for the purpose of determining compliance with the due process clause*, to such matters as the propositions of law set forth in the staff judge advocate's report . . ."[27] (Emphasis supplied.)

We cite a few other cases in the footnote,[28] all clearly based upon the view that due process of law is a right of persons accused before courts-martial.

Of course, due process of law is not a fixed formula of unchanging and unchangeable elements. Due process of law in the armed forces has always been in some respects different from due process under civil authority. "To those in the military or naval service of the United States the military law is due process."[29] But the essentials of a fair proceeding are requisites under all condi-

---

[27] *Supra*, 339 U.S. at 110.

[28] Shapiro v. United States, 69 F.Supp. 205 (Ct.Cl. 1947); Schita v. King, 133 F.2d 283 (8th Cir. 1943), *cert. denied*, 322 U.S. 761, 88 L.Ed. 1589, 64 S.Ct. 1273 (1944); United States v. Hiatt, *supra* note 26; United States v. Swenson, 165 F.2d 756 (2d Cir. 1948); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); Henry v. Hodges, 171 F.2d 401 (2d Cir. 1948); *cert. denied*, 336 U.S. 968, 93 L.Ed. 1119, 69 S.Ct. 937 (1949); Becker v. Webster, 171 F.2d 762 (2d Cir. 1949), *cert. denied*, 336 U.S. 968, 93 L.Ed. 1120, 69 S.Ct. 938 (1949); Montalvo v. Hiatt, 174 F.2d 645 (5th Cir. 949), *cert. denied*, 338 U.S. 874, 94 L.Ed. 536, 70 S.Ct. 135 (1949).

[29] Reaves v. Ainsworth, 219 U.S. 296, 304, 55 L.Ed. 225, 228, 31 S.Ct. 230 (1911). See also French v. Weeks, 259 U.S. 326, 335, 66 L.Ed. 965, 42 S.Ct. 505 (1922); United States v. Hiatt, *supra* note 26, at 666.

tions. The cases cited in note 28, *supra*, so show. Those essentials are fairly well identified and established in the cases.

We proceed, then, upon the premise that the protections of the Fifth and Sixth Amendments apply to courts-martial, except for the specific exception in the Fifth and the historic meanings at common law of the terms used in both Amendments. But this premise does not solve our present problem. The mere presence of constitutional questions, the assertion of constitutional rights, does not always give rise to a right of *habeas corpus*. This writ is an extraordinary remedy. As a usual rule it cannot be used as a substitute for an appeal or as a means for securing review of questions determined by the authorities duly empowered by Constitution and statute to determine them. This matter was exhaustively examined in respect to federal court proceedings by the Supreme Court in *Sunal* v. *Large*,[30] and it was there laid down as the governing rule that only in exceptional circumstances will *habeas corpus* be granted where appellate procedure is available for correction of the error. A detailed study of prior cases is included in the dissent of Mr. Justice Frankfurter. The Court "put to one side" in that case the problem of *habeas corpus* in proceedings begun in state courts and referred that question to several cases, of which the latest was Ex parte *Hawk*.[31] There it was held (1) that a person must exhaust his state remedies and (2) that a federal court will not ordinarily reexamine upon writ of *habeas corpus* questions adjudicated by state courts, but will do so where resort to those courts fails to afford a full and fair adjudication of the federal contentions raised.[32]

---

[30] 332 U.S. 174, 91 L.Ed. 1982, 67 S.Ct. 1588 (1947).

[31] 321 U.S. 114, 116-117, 88 L.Ed. 572, 64 S.Ct. 448 (1944).

[32] See Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 969, 35 S.Ct. 582 (1915); Moore v. Dempsey, 261 U.S. 86, 67 L.Ed.

The problem before us involves neither a federal court nor a state court. It involves a trial and appellate process, including process for new trial,[33] established by the federal Congress under a specific grant of power by the Constitution. It seems to us that in such a proceeding, under the general doctrines we have described, *habeas corpus* will not lie to review questions raised and determined, or raisable and determinable, in the established military process, unless there has been such gross violation of constitutional rights as to deny the substance of a fair trial and, because of some exceptional circumstance, the petitioner has not been able to obtain adequate protection of that right in the military processes. The rule as we have phrased it includes three propositions. (1) An accused before a court-martial is entitled to a fair trial within due process of law concepts. (2) The responsibility for insuring such fairness and for determining debatable points is upon the military authorities, and their determinations are not reviewable by the courts, except (3) that, in the exceptional case when a denial of a constitutional right is so flagrant as to affect the "jurisdiction" (*i.e.*, the basic power) of the tribunal to render judgment, the courts will review upon petition for *habeas corpus*. To support issuance of a writ of *habeas corpus* the circumstances shown by the papers before the court must so seriously affect the fundamental fairness of the trial and the validity of the appellate and later determinations as to deprive the military authorities of jurisdiction, *i.e.*, of power to act.

543, 43 S.Ct. 265 (1923); Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340 (1935); Jennings v. Illinois, 342 U.S. 104, 96 L.Ed. ___, 72 S.Ct. 123 (1951); Dorsey v. Gill, 80 U.S. App. D.C. 9, 23-25, 148 F.2d 857, 871-873 (1945), *cert. denied*, 325 U.S. 890, 89 L.Ed. 2003, 65 S.Ct. 1580 (1945); Sanderlin v. Smyth, 138 F.2d 729 (4th Cir. 1943); Morton v. Henderson, 123 F.2d 48 (5th Cir. 1941).

[33] 64 STAT. 147 (1950), 50 U.S.C.A. § 740.

We have discussed the applicability of the Constitution, but we note that the Articles of War, as enacted by the Congress and effective at the time of these trials, required the appointment of defense counsel,[34] provided for other counsel of accused's selection, if "reasonably available",[35] prohibited compulsory self-incrimination,[36] and provided that the accused should have copies of the record of trial.[37]

This brings us to consideration of the records in the cases before us.

We note, as a preliminary, that no allegation is made in these petitions as to the appointments of the courts-martial or of their jurisdiction over the accused or the alleged offenses.

By way of further preliminary we note that the two courts-martial in these cases were composed of different officers. The record in one case recites that these officers were detailed from areas far from Guam, and the orders in the other case indicate the same thing. The convictions were reviewed by different Boards of Review. They were then reviewed by the Judicial Council. Motions for new trials were made pursuant to Section 740 of Title 50 of the United States Code,[38] which provides that "The Judge Advocate General . . . is authorized . . . upon good cause shown, in his discretion to grant a new trial". The Judge Advocate General, after a special investigation ordered by him, denied the motions. Thus it appears that all the steps provided by Congress have been taken, and no irregularity in those respects is alleged.

---

[34] 41 STAT. 789 (1920), 10 U.S.C.A. § 1482 (1927).

[35] 41 STAT. 790 (1920), 10 U.S.C.A. § 1488 (1927).

[36] 41 STAT. 792 (1920), 10 U.S.C.A. § 1495 (1927).

[37] 41 STAT. 809 (1920), 10 U.S.C.A. § 1583 (1927).

[38] *Supra* note 33.

We look first at the Dennis petition and the papers relating to it. In essence it contains the following allegations:

1. Dennis was held without arraignment by the civil authorities of Guam from January 7 to January 17, 1949. During this period he was held incommunicado in solitary confinement, subjected to continuous questioning, beaten, and denied sleep and food. Four confessions were obtained from him as a result of duress, protracted interrogation, use of a lie detector, threats, promises, and trickery, and certain hairs were taken from his person, and these were introduced in evidence against him. He was not advised of his right against self-incrimination, in violation of the Fifth Amendment and of the 24th Article of War,[39] or warned that his statements would be used against him.

2. He was denied opportunity to consult with counsel during the entire period of his detention by the Guam authorities, from January 7th to on or about January 29th when he was returned to Air Force authorities. He was denied counsel of his choice; counsel was not appointed for him until April 8th; and he did not have opportunity to receive advice of counsel until "shortly before" his trial began on May 9, 1949. Defense counsel was not given, or did not take, adequate time to prepare and present his case.

3. Important evidence tending to prove his innocence was suppressed; efforts were made by the investigating and prosecuting authorities to procure perjured testimony against him; irrelevant, immaterial, prejudicial and inflammatory evidence was received against him; and evidence was taken from him, "planted", and presented at the trial. In the light of defense testimony placing him elsewhere at the time of the crime, of his repudiation of

---

[39] *Supra* note 36.

his coerced confession, and of inherently unbelievable circumstantial evidence, it must be presumed that the court-martial which convicted him was biased, prejudiced and vindictive toward him.

4. The atmosphere surrounding the trial was one of hysteria and terror.

We consider these allegations in the light of the papers before the District Court and under the principles we have enunciated.

First we consider the point concerning the confessions. There were four of them, two holographic and two dictated. Appellant urges a number of grounds for the exclusion of these confessions. He urges that detention without arraignment renders inadmissible the subsequent confessions, under the *McNabb* rule.[40] But military procedure does not provide for arraignment until the court-martial is convened, and moreover the *McNabb* rule is not a statement of constitutional requirement but is a rule of evidence promulgated by the Supreme Court in its supervisory capacity over the federal courts.

Appellant says that the confessions were the result of coercion, lack of sleep, continuous questioning, etc. The alleged circumstances which comprised the coercion were, of course, alleged facts. Testimony concerning them was taken at the trial. Herman Dennis himself testified. He did not describe continuous questioning for any appreciable length of time, did not mention lack of sleep or food, and specifically denied that he had been beaten. His testimony was to the effect that an officer insisted that his connection with the crime was known and that unless he confessed he would hang. The officers involved testified and related a different story of the events. They denied pressure, threats or promises. The admissibility and the worth of the confessions were argued vigorously

[40] McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943).

by defense counsel at the conclusion of the evidence. Thus the admissibility of the confessions was determined by the resolution of a disputed issue of fact, thoroughly explored at the trial and examined upon both of the successive reviews by the military authorities. The accused's right was to have the disputed issue of coercion examined and determined by the properly constituted authority. That was done. He does not claim that it was not done. The issue to be presented to the court, as clearly demonstrated by the material before it, would not be a flagrant disregard of the accused's rights but would be an alleged erroneous finding upon an issue of fact. Upon the face of the papers presented by the petitioner the issue was, in the light most favorable to him, clearly debatable, and there was substantial evidence in support of the conclusion. Under such circumstances courts certainly have no power to review the finding and decision.

Next we consider the point concerning counsel. The Articles of War contain two provisions respecting counsel. One (10 U. S. C. § 1482, *supra* note 34) provides that defense counsel shall be appointed by the authority which appoints the court and the trial judge advocate. The other (10 U. S. C. § 1488, *supra* note 35) provides that an accused may have counsel of his own selection, in place of or in addition to appointed counsel. On January 25, 1949, Dennis was advised by the authorities that four officers were available to him as defense counsel. Dennis requested one of these officers, a Lieutenant Colonel Daly, as individual defense counsel. On April 18th Commanding General advised Dennis that Colonel Daly was under charges and under psychiatric examination and was therefore not available. Dennis then wrote the General, on the same day, "In view of the contents of your letter of 18 April 1949, I do not desire the services of Lt Colonel Edward F. Daly and I will accept the regularly appointed defense counsel as counsel in my

case." Lieutenant Colonel Adrian W. Tolen had been appointed defense counsel, and Captain Bernard A. Katz and First Lieutenant John J. Ensley assistant defense counsel, by an order of the Commanding General on March 21st. (Special Order No. 65, Headquarters Twentieth Air Force, APO 234.)

Appointment of counsel by the convening authority satisfies constitutional requirements.[41] The Manual for Courts-Martial provides that the appointing authority shall determine whether special counsel requested by an accused is "available". When the trial began Dennis himself again requested Colonel Daly to assist regularly appointed counsel. The matter was explored, but the ruling of the appointing authority, affirmed by telegram from Washington, was deemed controlling. The charges, which had been served on April 14th, were then read and the accused was arraigned. A motion for the severance of the trial of Herman Dennis from that of Calvin Dennis was made and granted. Herman Dennis then pleaded not guilty. Colonel Tolen indicated that he had been active in the case as defense counsel throughout the investigation and that Captain Katz had been so for some thirty days.

The factual material given the court by the petitioner disproves his claim as to lack of counsel. It shows that the accused was not deprived of counsel; he had three, in fact. They were officially appointed more than a month before the trial. It also seems clear that the requirement that requested counsel be found "available" by superior authority is a reasonable one in view of the exigencies of military affairs. Upon the appeals to the Board of Review and the Judicial Counsel, appellant was represented by the same counsel who so ably pre-

---

[41] Altmayer v. Sanford, 148 F.2d 161 (5th Cir. 1945); Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785, 87 L.Ed. 1152, 63 S.Ct. 982 (1943).

sented this appeal. Certainly these events did not deprive the court-martial of jurisdiction.

In support of his allegations concerning the suppression of evidence, Dennis cites three exhibits attached to his complaint. One is an affidavit of a Chaplain, Captain E. E. Grimmett, one an affidavit of Lieutenant Colonel Edward Daly, and one an affidavit of a Miss Mary L. Hill. We can find in the affidavit of Chaplain Grimmett no reference to suppressed evidence. In the affidavit of Colonel Daly it is asserted that during the investigation and while affiant was engaged in preparation of the defense, "affiant learned that a set of Filipino dog-tags had been located in the immediate vicinity of the place where the body was found and that, on the following morning a Navy officer's uniform saturated with blood was discovered"; that these items were in possession of the Guam Police Department; that in preparation of the defense affiant gathered statements and affidavits concerning those items; that affiant's brief and material on this matter were taken from his desk while he was being hospitalized; and that none of this evidence was presented at the trial.

Colonel Daly was a witness at the trial, testifying twice, called once as a witness for the prosecution and once as a witness for the defense. He also appeared as a witness called by the prosecution in the Burns case. Upon these occasions he made no mention of the dog-tags or the Navy uniform. His present affidavit does not show that the prosecutors knew of such items or that Colonel Daly ever called them to the attention of counsel either for the prosecution or for the defense.

Miss Hill in her affidavit says that she assisted Colonel Daly in the preparation of the defense "and that he was in possession of material evidence in their behalf which was not presented to the court" and that while he was confined many of the papers, files and other evidence

were stolen from his office and quarters. Affiant does not say what the evidence was.

This matter of the dog-tags and the Navy uniform was presented to the Judge Advocate General upon the petition for a new trial. He held, after an investigation made at his direction, that the charge that this evidence was withheld from the court, as alleged in an affidavit of Colonel Daly, was baseless. Thus the official charged by Congress, under its constitutional power, to make this determination has made it. Congress provided no review of that determination. Petitioner's showing on the papers before us, which we have described, does not indicate any circumstances which could be regarded as a premise for an allegation that the Judge Advocate General was arbitrary or outside the boundaries of reasonable conclusion. That being so, the matter is not reviewable upon *habeas corpus*. Without attempting to state exhaustively the reasons for this conclusion on our part, we refer to the discussions of the Second Circuit Court of Appeals in *Schechtman* v. *Foster*[42] and of the First Circuit Court of Appeals in *Coggins* v. *O'Brien* (both Judge Woodbury's and Chief Judge Magruder's opinions),[43] of the right to *habeas corpus* in a federal court when a new trial has been denied in a state court. The full text of those discussions is helpful.[44] The sum of them is that, where a petition for a new trial upon allegations of perjured testimony known to the prosecutor was denied by the state corrective process, a federal district court has a large measure of discretion to determine whether the case, upon the papers before it and without hearing, is one of the exceptional cases which requires federal authority to inquire into state administration of justice. In the matter before us there is nothing to depict the exceptional

---

[42] 172 F.2d 339 (2d Cir. 1949), *cert. denied*, 339 U.S. 924, 94 L.Ed. 1346, 70 S.Ct. 613 (1950).

[43] 188 F.2d 130 (1st Cir. 1951).

[44] See also United States v. Johnson, 327 U.S. 106, 90 L.Ed. 562, 66 S.Ct. 464 (1946).

case which would require the courts to inquire into the treatment of this particular matter by the duly constituted military authorities. There is nothing in this record to indicate that the Judge Advocate General based his denial of the motion for new trial upon a denial of any constitutional right.[45]

This court has received a letter from one Francis L. Moylan, a witness at the trial, who says that he did see these petitioners near the scene of the crime shortly before the murder, as he testified, but that there were two other men also there and that, while he tried to bring this out, he was not permitted to do so. This letter is not part of the record and is unsworn. Moreover the record shows that Moylan was extensively cross-examined by the defense and was examined also by the court but made no reference whatever to seeing other persons and made no attempt to do so.

The matter of "planting" evidence concerned hairs found on a smock and in a truck. This was the subject of testimony and argument at the trial. Defense counsel in summation explicitly queried whether the smock had not been planted in the truck by an investigator. The matter was considered upon the reviews. It is covered by what we have already said.

No fact shown in the record supports the general allegation of hysteria and terror, and every relevant fact is to the contrary. The members of the courts-martial were, as we have said, officers in the Air Force and were detailed from distant points. The members of the court frequently and intensively questioned witnesses for the prosecution.

---

[45] *Cf.* Phyle v. Duffy, 334 U.S. 431, 444, 92 L.Ed. 1494, 68 S.Ct. 1131 (1948); Young v. Ragen, 337 U.S. 235, 238, 93 L.Ed. 1333, 69 S.Ct. 1073 (1949); Woods v. Nierstheimer, 328 U.S. 211, 216, 90 L.Ed. 1177, 66 S.Ct. 996 (1946); Woolsey v. Best, 299 U.S. 1, 2, 81 L.Ed. 3, 57 S.Ct. 2 (1936); Hedgebeth v. North Carolina, 334 U.S. 806, 807, 92 L.Ed. 1739, 68 S.Ct. 1185 (1948).

It is clear that the other allegations of the petition do not go to the jurisdiction of the court-martial, even under the expanded concept of "jurisdiction" which we have used in this case.

The Burns petition contains the following allegations:

1. Burns was held without arraignment by the Guam authorities from January 7 to January 17, 1949. During this period he was held incommunicado, subjected to continuous questioning, beaten, and denied sleep and edible food. Burns did not confess, but he alleges that the confessions of Herman Dennis and Calvin Dennis, the alleged third participant in the offense charged, signed coerced confessions implicating him.

2. He was denied opportunity to consult with counsel during his detention by the Guam authorities. He was not allowed to obtain the advice of counsel until one day before his court-martial began on May 27, 1949.

3. Important evidence tending to prove his innocence was suppressed. Testimony given against him at the trial by Calvin Dennis was the result of coercion, threats and promises and is now shown to have been perjured by the affidavit of Calvin Dennis attached to the petition.

4. The trial was conducted in an atmosphere of terror, hysteria and vengeance.

Several of the foregoing allegations are the same as or similar to those of the Dennis petition. What we have already said will suffice for those points. The situations with respect to counsel and the confessions differ somewhat from the circumstances in the Dennis case. We therefore discuss those features.

Defense counsel for Burns were appointed by the proper authorities by formal order on March 21st. They were the same as those appointed in the Dennis case, Lieutenant Colonel Tolen, Captain Katz, and Lieutenant Ensley. Burns was brought to trial May 27th. The members of the court were not the same officers who sat in the Dennis case. The record shows the following:

"PROSECUTION: The accused is present together with the regularly appointed defense counsel and assistant defense counsel. By whom does the accused desire to be defended?

"DEFENSE: The accused desires to introduce as individual counsel Captain Martin S Drucker, Headquarters, Marianas Bonins Command, and desires the regularly appointed defense counsel, Lieutenant Colonel Adrian W Tolen, and assistant defense counsel, First Lieutenant John J Ensley, to act as associate counsel. Let the record show that Captain Drucker is a member of The Judge Advocate General's Corps, Department of the Army, and is a qualified lawyer. Let the record also show that Captain Bernard A Katz who was appointed as assistant defense counsel in this case has been excused by the accused and his name has been deleted from the court by an order which will be appended to the record.

"PROSECUTION: Is the accused satisfied then with counsel indicated by defense at this time?

"ACCUSED: Yes, sir."

Appellant refers to the affidavit of Chaplain Grimmett as support for the allegation respecting the one-day preparation of counsel. The affidavit says "That the Captain who finally represented Sergeant Burns [had] only one day to prepare his case". The reference must be to Captain Drucker, who was "individual counsel", *i.e.*, counsel selected by the accused, and not the appointed counsel. That the accused may not have engaged or selected individual counsel until one day before trial (there is no direct statement in this record to that effect) is not ground for complaint. Appointed counsel had been designated long prior to trial. No request for a continuance was made, nor was any hint offered that Captain Drucker was unprepared.

The only assertions relating to other counsel sought by Burns concern an effort by Chaplain Grimmett to engage a civilian lawyer in Guam who required a $15,000 fee, of which $10,000 was to be a cash retainer in advance.

The accused having no such funds, the Chaplain undertook a contribution campaign among the military personnel throughout the islands. The military authorities advised him that collections of such sums would have to be under supervision of the authorities. He alleges that he was informed by unnamed persons that they had been intimidated by their commanding officers into not contributing. Nothing further seems to have come of it. Obviously such circumstances do not constitute a denial of assistance by counsel.

We turn next to the matter of the alleged deliberate use of coerced and perjured testimony of Calvin Dennis. No confessions alleged to have been made by Burns were offered at his trial, and he did not take the stand. Calvin Dennis testified for the prosecution and gave eye-witness testimony to the guilt of Burns. Calvin Dennis now alleges that his former testimony was coerced and was false. It was vigorously maintained by defense counsel at the trial that Calvin Dennis's testimony was perjured. The decision of the court represents a finding upon a disputed question of fact. Both military reviewing authorities considered the point. Calvin Dennis's subsequent repudiation of this testimony was presented to the Judge Advocate General on the application for new trial. What we said in respect to the suppressed evidence allegation in the Herman Dennis case applies to the present point.

As is our frequent practice in capital cases, we have examined the whole of both of these long records. Accused were vigorously defended at all points. Actions of the military authorities appear to have conformed meticulously to the rules of procedure, and the reviews were exhaustive. We conclude, in agreement with the District Court, that the facts alleged in the petitions, viewed in the light of the return to the rule, do not supply grounds upon which the relief sought can be granted. The judgments will be affirmed.

The executions will be further stayed for a period of sixty days to enable counsel for appellants to file petition for writ of *certiorari*, if they are so minded, and to apply to a Justice of the Supreme Court for a further stay pending disposition of such a petition.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: The majority of this court points out, and I agree, that the writ of habeas corpus has been the instrument by which allegations of jurisdictional infirmity in courts-martial have been tested. For this purpose, jurisdiction has long left its technical meaning behind and become, instead, the vehicle through which an expanding conception of due process has been applied to matters arising out of military as well as civil law. Through the years, those constitutional considerations which constitute the fundamentals of due process have been incorporated into the "jurisdiction" concept so that their denial has been said to deprive a court-martial of jurisdiction.

I cannot agree, however, that we should narrow our scrutiny of courts-martial by singling out the individual allegations to determine just how "flagrant" the allegedly unconstitutional actions are. Such an approach could whittle down the "freedom writ" and virtually withdraw the military from its reach. The fairness of a trial must be determined by appraisal of the whole rather than by picking and choosing among its component parts. A total configuration of the allegations in these cases discloses something which the separate parts do not. The totality, if proved, would constitute the very antithesis of fairness.

Although the cases recognize the unavailability of certain constitutional guarantees in courts-martial,[1] they

[1] *E.g.*, trial by jury, *see* Whelchel v. McDonald, 340 U.S. 122, 127 (1950), and cases cited therein.

have not foreclosed others which go to the question of fair trial. Violation of guarantees embodied in the Constitution and affecting the basic fairness of a trial makes a court martial void—not only in my view but in that of the cases.[2] Similarly, although violation of certain Articles of War by the military in the course of a court-martial may not be challengeable by habeas corpus, other violations which involve denial of a fair trial would result in issuance of the writ.[3]

These principles are clearly illustrated by the recent cases of *Whelchel* v. *McDonald*, and *Hiatt* v. *Brown*. *Hiatt* involved a provision of the Articles of War which gave the appointing commander discretion in naming the law officer of the court-martial. Although the writ did not issue, the Court made it clear that one would issue if there had been a "gross abuse of that discretion," for that "would have given rise to a defect in the jurisdiction of the court-martial."[4] Similarly, in *Whelchel*, the Court thought it "plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. * * * a denial of that opportunity * * * goes to the question of jurisdiction."[5]

If the abuse of a statutory discretion which affects the fairness of the trial would constitute a jurisdictional defect, so also would violation of constitutional safeguards

---

[2] Some of these cases are collected in Sunal v. Large, 332 U.S. 174, 184 (1947), dissenting opinion of Mr. Justice Frankfurter; Smith v. United States, 88 U.S.App.D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); see note 39, *infra;* Note, 61 HARV. L. REV. 657 (1948).

[3] *Compare* Humphrey v. Smith, 336 U.S. 695 (1949), *with* Hiatt v. Brown, 339 U.S. 103 (1950).

[4] Hiatt v. Brown, 339 U.S. 103, 109 (1950).

[5] Whelchel v. McDonald, 340 U.S. 122, 124 (1950).

designed to assure a fair trial. Obviously, the Constitution furnishes no lesser a guide to the military than does a statute.[6] In either case, that which goes to the essence of a fair trial must be accorded an accused and failure to do so gives rise to a jurisdictional defect.

Appellants contend that they have been denied rights which bear vitally on the fairness of their trials and hence a writ of habeas corpus should issue. I will take up the more serious allegations in turn.

Unlawful Detention

According to the affidavits attached to the petition for the writ, appellants Herman Dennis and Burns were apprehended by the military authorities on Guam on January 7, 1949.[7] They were turned over to the civil authority governing the island and held "incommunicado."[8] By January 13, after six days of repeated questioning without benefit of counsel, Dennis had signed four separate confessions, which vary considerably in detail and content.[9] The detention of both Dennis and Burns continued without "arraignment" until January 17, 1949.[10] At no

---

[6] *Cf.* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[7] Transcript of H. Dennis Record, p. 10; Transcript of Burns Record, p. 21.

[8] *I.e.*, in virtual solitary confinement, Transcript of H. Dennis Record, pp. 3, 137; Record of H. Dennis Trial by General Court-Martial, p. 221; Transcript of Burns Record, p. 16.

[9] Transcript of H. Denis Record, pp. 61-3. The latter two, unlike the first two, contained statements that they were voluntary and that Dennis had been advised that they could be used against him. Dennis tries to raise here the voluntary nature of these confessions, but he also testified at the trial that they were voluntary and alleges no grounds why he should be allowed to repudiate that testimony.

[10] Transcript of H. Dennis Record, p. 3; Transcript of H. Dennis Trial by General Court-Martial, p. 227; Transcript of Burns Record, p. 16.

time up to that point was either appellant furnished with or permitted to summon counsel,[11] despite a specific request of Dennis for counsel made at about the time of the second confession.[12] On January 25, the Commanding General of the Twentieth Air Force "forwarded a letter to the accused stating that [named counsel] were available."[13] Appellants were returned to the custody of the military on or about January 29, 1949, without, they allege, having been permitted to consult counsel up to that time.[14]

Appellees contend that this detention violated none of appellants' rights since "there is no provision for • • • preliminary hearing or arraignment in military law" and no applicable section of the Guam civil regulations was violated. What the military or Guam laws require are of small moment. We are concerned here with "fundamental principles of liberty and justice."[15] Although the exact point at which appellants were free to consult with counsel is not clear from the record, it appears that they did not receive assistance until after a long period of incommuni-

---

[11] Transcript of H. Dennis Record, p. 4; Transcript of Burns Record, p. 16.

[12] Record of H. Dennis Trial by General Court-Martial, p. 232.

[13] Transcript of H. Dennis Record, p. 23; Transcript of Burns Record, p. 34.

[14] Transcript of H. Dennis Record, p. 4; Transcript of Burns Record, p. 16. The record does not indicate what assistance, if any, appellants had between their delivery to military authorities about January 29, and March 21. On that date, the three counsel who represented them at the court-martial were named. As described in the majority opinion, one of these three was subsequently replaced with respect to appellant Burns.

[15] Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

cado detention with repeated questioning, and until after Dennis had confessed. In my view, this detention suggests "all the evil implications of secret interrogation of persons accused of crime." [16] I put aside all arguments based on the emergencies of the battlefield and the impracticality of reasonable promptness in furnishing defense counsel under such circumstances. Whatever validity these arguments have where the detention occurs in a combat zone, they could have no application to the Island of Guam—which was under a civil administration—in the relatively peaceful year of 1949.

Interference with Counsel

About January 25, appellants were permitted to consult with two chaplains, one of whom made unsuccessful attempts to raise a large amount of money for the retention of local civilian counsel. One of the supporting affidavits asserts the affiant's personal knowledge of interferences with the chaplain's mail, etc., which were designed to thwart attempts to raise these funds.[17] Appellants also asked for the assistance of Lt. Colonel Daly, Staff Judge Advocate of the Marianas Air Material Command. Daly was first permitted to act as counsel, but later was withdrawn by the Commanding General as "not available." [18] While it is clear that the Commanding General's determination concerning the availability of counsel may not be reviewed by habeas corpus in the absence of a gross

---

[16] McNabb v. United States, 318 U.S. 332, 344 (1943).

[17] Transcript of H. Dennis Record, pp. 11-13, 24; Transcript of Burns Record, pp. 22-4, 35. Chaplain Grimmett was not called to testify. Affiant Daly testified for the defense but was not questioned concerning these facts which he acknowledges he knew before the trial.

[18] Transcript of H. Dennis Record, p. 17; Transcript of Burns Record, p. 28. The notice of withdrawal was dated April 18, 1949.

abuse of discretion, it is equally clear that whenever such abuse is present, the determination may be reviewed by habeas corpus.[19] Daly's affidavit attached to the petition alleges that the charges on the basis of which he was made "unavailable" were "all totally without foundation and * * * were contrived by the Commanding Generals * * *."[20] This, of course, is a mere conclusionary statement, and, standing alone, would be entitled to slight consideration. But it does not stand alone. For he alleges that the officer assigned to investigate him was told by the Commanding General that "he must 'dig something up to pin'" on Daly; and that a witness who testified for the prosecution at appellants' trial admitted to Daly that the investigator had promised him his "stripes" back "if he would make a statement against [Daly]."[21] Moreover, one affiant, Mrs. Hill, affirmed that an attempt was made to induce her to give false testimony at the trial upon the promise that it would be helpful to Daly "who was then in serious difficulties because of his attempts to defend the accused and bring the true facts before the court."[22] Like the alleged interference with the fund-raising campaign, these allegations touch on matters outside the court-martial record.[23]

---

[19] *Cf.* Hiatt v. Brown, 339 U.S. 103 (1950).

[20] Transcript of H. Dennis Record, p. 27; Transcript of Burns Record, p. 38.

[21] Transcript of H. Denis Record, p. 27; Transcript of Burns Record, p. 38. Mrs. Hill, one of the supporting affiants, was present and witnessed this. *Id.* at 44.

[22] Transcript of H. Dennis Record, pp. 32-3; Transcript of Burns Record, pp. 43-4. See note 31, *infra*.

[23] Daly and Mrs. Hill were called as defense witnesses but were not questioned concerning these matters. Both knew of them before trial, but the record does not disclose whether or not this knowledge was communicated to defense counsel before trial.

Suppressed Evidence

The petition asserts that "[t]he prosecution was so intent upon securing a conviction of your petitioner despite that knowledge of his lack of guilt that they suppressed important evidence tending to show his innocence * * *."[24] Daly's affidavit pins this down by alleging, on the basis of personal knowledge, "that a set of Filipino dog-tags had been located in the immediate vicinity of the place where the body was found and that on the following morning a Navy officers [sic] uniform saturated with blood was discovered."[25] This allegation raises matters not contained in the court-martial record.[26] We are not told either in the affidavit or in the petition how these items of evidence tie in with appellants' defense but we can assume with respect to the uniform that a tie-in would be difficult to show until the uniform had been examined for hairs, the blood stains analyzed, etc. With respect to the dog-tags, an independent search of the Herman Dennis court-martial record discloses that one prosecution witness testified that he had observed two customers inside the store talking with the victim shortly before the crime. One of the two he identified as resembling appellant Herman Dennis.[27] On cross-examination, this witness admitted testifying during the course of pre-

---

[24] Transcript of H. Dennis Record, p. 5.

[25] *Id.* at 29. Transcript of Burns Record, p. 40.

[26] Daly does not allege that the prosecution, as distinguished from the Guam police, was aware of the existence of this evidence. I think it unrealistic to suppose that they were not. In my view, Daly's shortcoming, if any, in not testifying as to these matters at trial can hardly be attributed to the defendant-appellants.

[27] Record of H. Dennis Trial by General Court-Martial, pp. 103-5.

liminary investigations that the customers "appeared to be Filipino soldiers." [28]

Attempts to Suborne Perjury and Intimidate Witnesses

Appellants alleged that the prosecution "sought to procure witnesses to perjure themselves * * * and intimidated and threatened those who sought to help your petitioner * * *." [29] In support of this allegation, Chaplain Grimmett's affidavit charges that the Trial Judge Advocate "went to each of the defense witnesses and intimidated them with threats of perjury unless they changed their statements," and that this could be substantiated by specifically named people—including defense counsel—"and any of the defense witnesses." [30] The affidavit does not state whether or not defense counsel knew of this before trial. There was no inquiry of any of the witnesses, except Calvin Dennis whom I shall discuss in a moment, concerning intimidation or any matter touching on attempts to suborne perjury. This allegation, like many others, therefore raises matters outside the court-martial record.

---

[28] *Id.* at 105; see also Record of Burns Trial by General Court-Martial, p. 140. In this connection, it should be noted that the Clerk of the court has received an unsworn letter, dated April 16, 1952, from one of the Government's witnesses to the effect that although he observed appellants near the scene of the murder, he also observed two other persons. This letter reads in part: "However, as my employees and I left, a few minutes before Miss Ruth Farnsworth was killed, there were two men who went into the shop. Their car was parked to the right of my Jeep and to the left was a military truck. The description of these two men was given—yet at the trial this evidence was not brought up. When I tried to bring it up several times it seemed I was talking to the prosecutor and his subordinates; therefore, these men did not receive a fair trial."

[29] Transcript of H. Dennis Record, pp. 5-6.

[30] Transcript of H. Dennis Record, p. 15; Transcript of Burns Record, p. 26.

The allegation of attempts to suborne perjury is given specific content by witness Mary L. Hill. Her supporting affidavit affirms that in the presence of two other named persons one of the prosecution's chief investigators "tried to prevail upon [her] to make a false statement before the court"[31] concerning the voluntariness of appellant Herman Dennis' confessions. The Judge Advocate General of the Air Force acknowledged in a memorandum to the Secretary of the Air Force that there was "substantial evidence" that Mrs. Hill had been prevailed upon by the prosecution's investigators to make a false affidavit but he dismissed the matter as immaterial since Mrs. Hill resisted these pressures and testified truthfully at the court-martial.[32] Lt. Colonel Daly, the deposed defense counsel, also swore that Sergeant Wright, who was interrogated in the pre-trial investigations, told him that he had been threatened by an investigator for the prosecution with a perjury prosecution "if he testified at the trial to what he himself, in his own mind, was thoroughly convinced had happened * * *," and that he had communicated these threats to the Staff Judge Advocate of the Twentieth Air Force.[33] Sergeant Wright was not called to testify at the trial.

Coerced Confession of Calvin Dennis

One other point remains with respect to Robert W. Burns. Three persons were charged with the perpetration of these crimes—Burns, and Herman Dennis, appellants here, and Calvin Dennis. They were tried separately. At the Burns trial, Calvin Dennis, the only al-

---

[31] Transcript of H. Dennis Record, p. 33; Transcript of Burns Record, p. 44. See note 22, *supra*.

[32] Transcript of H. Dennis Record, p. 126.

[33] Transcript of H. Dennis Record, p. 25; Transcript of Burns Record, p. 36.

leged eye-witness to the crimes, "confessed," implicating Burns. Burns alleges that except for this confession, "no testimony in the record in any way directly connects this petitioner with the crime";[34] that such implication was false; and that such testimony at the trial constituted perjury which had been suborned by the prosecution upon a promise of reward therefor in the form of a lesser punishment for himself. This allegation is supported by an affidavit from Calvin Dennis in which he confesses his perjury and the fact that it was induced by the prosecution by physical coercion, by threats that the investigators were "going to pin murder and rape and kidnapping on me,"[35] and by offers of "part of the $4,000 dollars [sic] reward if I sign a statement."[36] Calvin Dennis further affirms that the Trial Judge Advocate "promise [sic] me if I would testify against Burns he would see that my sentence would be disapprove [sic] in Washington at the reviewing board."[37]

It is true that Calvin Dennis was questioned at the court-martial and testified to the voluntary nature of his confession. Ordinarily, as the majority points out, this issue would be deemed settled, for habeas corpus will not lie to review the fact finder's acceptance of one version of events rather than another. But this case goes beyond the limits of that well-accepted doctrine. Calvin Dennis' affidavit is clearly new evidence of a vital nature which calls for a reappraisal of the voluntariness of his confession.[38]

---

[34] Transcript of Burns Record, p. 18.

[35] Transcript of Burns Record, p. 47.

[36] *Ibid.*

[37] *Ibid.* See also Daly's affidavit. *Id.* at 36-7.

[38] *Cf.* United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943); Mooney v. Holohan, 294 U.S. 103 (1935).

Conclusions

I do not assume that due process is the same in a military setting as it is in a civil setting. For

> "Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. * * * it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law * * *."[39]

---

[39] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944). The court illustrated what it meant by a denial of fundamental fairness: defendant induced to testify against self by use of threats or promises in presence of court and jury, Chambers v. Florida, 309 U.S. 227 (1940); use of fraud, collusion, trickery and subornation of perjury on part of state prosecution, Mooney v. Holohan, 294 U.S. 103 (1935); domination of trial by mob violence in courtroom, Moore v. Dempsey, 261 U.S. 86 (1923).

Cf. Whelchel v. McDonald, 340 U.S. 122 (1950) (opportunity to present defense of insanity); *see* Hiatt v. Brown, 339 U.S. 103 (1950) (abuse of discretion in appointing law member of court-martial); Wade v. Hunter, 336 U.S. 684, 688-90 (1949) (double jeopardy); Powers v. Hunter, 178 F.2d 141, 145 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950) (court can review severity of court-martial sentence to see if it violates prohibition against cruel and unusual punishment); Schita v. King, 133 F.2d 283 (8th Cir. 1943), *cert. denied*, 322 U.S. 761 (1944) (denial of counsel of choice, denial of right to call witnesses, testimony against petitioner given out of his presence at trial, witnesses testified against defendant without being sworn, petitioner and his witnesses intimidated, etc.).

Appellants' allegations, supported by affidavits, raise serious doubt whether "the whole course of events"[40] from apprehension to conviction did not amount to a serious denial of fundamental fairness. If proved, they would paint a portrait of inquisitorial zeal rather than of a fair trial in the Anglo-American sense.

The allegations concerning detention without counsel are supported by the record and are not in dispute. Those touching interference with counsel, suppressed evidence, attempts to suborne perjury and intimidate witnesses, and the repudiated confession of Calvin Dennis rely on matters outside the record, which therefore were not considered by the convicting tribunal. Appellees do not think this important, however, since allegations similar to those made herein have been the subject of special independent investigation by high military authorities. These reveiw and investigatory procedures are wisely designed to minimize possible injustices at the court-martial level and the apparently thorough study which these cases have received cannot be disregarded. But "perfection in the machinery for correction * * * does not seem to [me] sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void."[41] Moreover, the Supreme Court recently pointed out that the availability of military review and investigating procedures which appellants used in these cases does not preclude further review by way of petition for writ of habeas corpus.[42] The basis for the Judge Advocate General's denial of a new trial in these cases is not clear with respect to all of appellants' allegations. To the extent that

---

[40] Smith v. Uinted States, 88 U.S.App.D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951).

[41] Moore v. Dempsey, 261 U.S. 86, 91-2 (1923).

[42] Gusik v. Schilder, 340 U.S. 128, 132-3 (1950).

he found them insufficient, if true, to grant the relief sought, he abused his discretion.[43]

In view of the serious nature of the allegations and supporting affidavits, I would remand to the District Court for a hearing on the allegations of the petition.

[43] Even though the denial of a new trial was based to some extent on disbelief of the allegations, I think the exceptional circumstances of these cases require a hearing in the District Court. *Cf.* Ex parte Hawk, 321 U.S. 114, 118. (1944); Coggins v. O'Brien, 188 F.2d 130, 133 (1st Cir. 1951); *but cf.* Schechtman v. Foster, 172 F.2d 339 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950).

[fol. 61] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1952

No. 11,419

ROBERT W. BURNS, Appellant,

v.

ROBERT A. LOVETT, Secretary of Defense, et al., Appellees

No. 11,420. April Term, 1952

HERMAN P. DENNIS, JR., Appellant,

v.

ROBERT A. LOVETT, Secretary of Defense, et al., Appellees

Appeals from the United States District Court for the District of Columbia

Before: Prettyman, Proctor and Bazelon, Circuit Judges

JUDGMENT—Filed July 31, 1952

These appeals came on to be heard on the transcripts of the records from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and the same are hereby, affirmed.

It is further ordered by the Court that execution of the death sentences in these cases be, and the same is hereby, stayed to and including September 30, 1952, to enable counsel for appellants to file petition for writ of certiorari, if they are so minded, and to apply to a Justice of the Supreme Court for a further stay pending disposition of such a petition.

Per Circuit Judge Prettyman.

Dated: July 31, 1952.

Separate dissenting opinion by Circuit Judge Bazelon.

[fol. 61a] [File endorsement omitted]

[Title omitted]

UNITED STATES COURT OF APPEALS

ORDER AMENDING JUDGMENT—Filed August 25, 1952

Before: Prettyman, Proctor and Bazelon, Circuit Judges

It is Ordered by the Court that the judgment of this Court entered herein July 31, 1952 be, and it is hereby, amended by striking the date "August 30" in the third line of the last paragraph and inserting in lieu thereof the date "September 30", so that the last paragraph of said judgment, as amended, will read as follows:

> "It is further ordered by the Court that execution of the death sentences in these cases be, and the same is hereby, stayed to and including September 30, 1952, to enable counsel for appellants to file petition for writ of certiorari, if they are so minded, and to apply to a Justice of the Supreme Court for a further stay pending disposition of such a petition."

Per Curiam.
Dated: Aug. 25, 1952.

[fols. 62-63] DESIGNATION OF RECORD—Omitted in Printing

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR., Petitioners,

vs.

ROBERT A. LOVETT, Secretary of Defense, et al.

ORDER ALLOWING CERTIORARI—Filed December 15, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
OCT 20 1952
CLERK

IN THE

Supreme Court of the United States

October Term, 1952
No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL,
Counsel for Petitioners.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
LEONARD W. SCHROETER,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. BArclay 7-0330
49

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Specifications of Error	5
Reasons for Allowance of the Writ	6
Conclusion	26
Appendix	27

Table of Cases Cited

Anderson v. United States, 318 U. S. 350	14, 24
Becker v. Webster, 171 F. 2d 762 (C. A. 2d 1949)	9
Behrens v. Hironimus, 166 F. 2d 245 (C. A. 4th 1948)	7
Chambers v. Florida, 309 U. S. 227	12
Darr v. Burford, 339 U. S. 200	22
De War v. Hunter, 170 F. 2d 993 (C. A. 10th 1948), cert. den. 337 U. S. 908	10, 19
Ex parte Hawk, 321 U. S. 114	19, 20, 21, 22
Ex parte Lange, 18 Wall 163	6
Ex parte Milligan, 71 U. S. 2	9
Ex parte Quirin, 317 U. S. 1	9
Ex parte Royall, 117 U. S. 241	6
Ex parte Siebold, 100 U. S. 371	6

PAGE

Gallegos v. Nebraska, 342 U. S. 55 ..... 14, 24
Gambino v. United States, 275 U. S. 310 ..... 14, 24, 25
Gault v. Burford, 173 F. 2d 813 (C. A. 10th 1949) 20
Goodwyn v. Smith, 181 F. 2d 498 (C. A. 4th 1950) 20
Graham v. Squier, 132 F. 2d 681 (C. A. 9th 1942) 7
Gusik v. Schilder, 340 U. S. 128 ..... 19fn.

Hiatt v. Brown, 339 U. S. 103 ..... 8, 17
Hicks v. Hiatt, 64 F. Supp. 238 (M. D. Pa., 1946) 24
House v. Mayo, 324 U. S. 42 11
Humphrey v. Smith, 336 U. S. 695 8

In re Wrublewski, 71 F. Supp. 143 (N. D. Cal. 1947) 9

Johnson v. Eisentrager, 339 U. S. 763 9
Johnson v. Zerbst, 304 U. S. 458 ..... 7, 8, 18

Lisenba v. California, 314 U. S. 219 ..... 7, 13

Malinski v. New York, 324 U. S. 401 13
McClaughry v. Deming, 186 U. S. 49 23
McNabb v. United States, 318 U. S. 332 24
Mooney v. Holohan, 294 U. S. 103 ..... 7, 14, 15, 16
Moore v. Dempsey, 261 U. S. 86 ..... 7, 18, 21

Pyle v. Kansas, 317 U. S. 213 ..... 14, 15, 16

Rochin v. California, 342 U. S. 165 13

Schita v. King, 133 F. 2d 283 (C. A. 8th 1943) 10
Sunal v. Large, 332 U. S. 174 7

United States v. Baldi, 192 F. 2d 540 (C. A. 3rd 1951); cert. grant. 343 U. S. 403 ..... 20, 21
United States v. Crystal, 131 F. 2d 576 (C. A. 2d 1942), cert. den. 319 U. S. 755 9
United States v. Grimley, 137 U. S. 147 6
United States v. Hiatt, 141 F. 2d 644 (C. A. 3d 1944) 10
United States v. Swenson, 165 F. 2d 756 (C. A. 2d 1948) 9

PAGE

Wade v. Hunter, 336 U. S. 684 8
Waite v. Overlade, 164 F. 2d 722 (C. A. 7th 1947), cert. den. 334 U. S. 812 10
Waley v. Johnston, 316 U. S. 101 ..... 7, 8, 18
Walker v. Johnston, 312 U. S. 275 11
Ward v. Texas, 316 U. S. 547 13
Watts v. Indiana, 338 U. S. 49 12
Weeks v. United States, 232 U. S. 358 24
White v. Texas, 310 U. S. 530 13
Whelchel v. McDonald, 340 U. S. 122 8
Wrublewski v. McInerney, 166 F. 2d 243 (C. A. 9th 1948) 9

Statutes Cited

Title 10, United States Code, Section 1488 2
Title 10, United States Code, Section 1495 2
Title 10, United States Code, Section 1542 2
Title 28, United States Code, Section 2254 20

Penal Code of Guam:

Section 27 27
Section 686 ..... 2, 12, 24
Section 780 ..... 2, 12, 24
Section 825 ..... 2, 12, 24

Other Authorities

	PAGE
Hearings Before Sub-Committee of the Committee on Armed Services on S. 857 and H. R. 4080, United States Senate, 81st Congress, 1st Session (1949)	22
Report of the War Dep't. Advisory Committee on Military Justice (1946)	23
Farmer and Wells, Command Control—or Military Justice, 24 *N. Y. U. L. Q. Rev.* 263 (1949)	22
35 *Cornell L. Q.* 15 (1949)	22
2 *Stanford L. Rev.* 547 (1949)	22

IN THE

Supreme Court of the United States

October Term, 1952

No.

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Robert W. Burns and Herman P. Dennis, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 31, 1952.

Opinion Below

The memorandum opinions of the United States District Court for the District of Columbia are reported at 104 F. Supp. 310, 312 (R. 18). The opinion of the Court of Appeals for the District of Columbia is not yet reported (R. 21).

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 7). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1251(1).

Questions Presented

1. Whether an American citizen solider, after trial and conviction by military authorities, may obtain a review of the court-martial conviction in a civil court by habeas corpus where the military proceedings, as a totality, show a complete absence of that fundamental fairness essential to a fair trial under Anglo-American jurisprudence.

2. Whether on the basis of allegations averring flagrant denials of fundamental rights, which in the present posture of these cases are admitted as true, petitioners are entitled to a hearing on the merits and to an independent determination by a civil court as to whether their military trials and convictions violated constitutional due process.

3. Whether these courts-martial were ousted of jurisdiction by the admission of damaging evidence against petitioners when such evidence had been illegally extracted by federal civil authorities while they held petitioners in custody.

Statutes Involved

Title 10, United States Code, Section 1488
Title 10, United States Code, Section 1495
Title 10, United States Code, Section 1542
Sections 686, 780, 825 of the Penal Code of Guam
These are set out in the Appendix

Statement

Petitioners, who are citizens of the United States and members of the United States Air Force, are individually seeking petitions for writs of habeas corpus to secure their release from military custody. One petition is being filed for both petitioners since the issues raised in each case are the same. They are now being detained by the Japan Logistical Command and are awaiting execution of sentences of death pursuant to convictions by general courts-martial of the United States Air Force for the murder and rape of Ruth Farnsworth, a civilian employee on the Island of Guam. The crime took place on or about December 11, 1948 (R. 1-2).

On January 7, 1949, petitioners, who were stationed on Guam, an insular possession of the United States and at that time under the civil administration of the United States Navy, were surrendered by the military authorities to the civil police authorities (R. 2-3). The civil authorities took them into custody and held them incommunicado without process (R. 3). They were subjected to continuous questioning (R. 3), beaten (R. 3), denied sleep and edible food (R. 3) and were not allowed to consult counsel during the entire time they were held in custody (R. 3). Herman P. Dennis, Jr., was subjected to a lie detector test and held in solitary confinement (R. 11), and Robert W. Burns was placed in a death cell (R. 3). Petitioner Dennis had certain pubic hairs taken from his person without being advised of his rights against self-incrimination, and these specimens were subsequently used in evidence against him (R. 12). As a result of coercion, threats and promises, after being told what to say by police officers and without being advised of his rights, he made four confessions on or about January 11, 12 and 13, implicating himself in the crime for which he was subsequently charged (R. 11).

On or about January 30, 1949, the civil authorities returned petitioners to the custody of the United States Air Force (R. 3). On February 1, 1949 (R. 11) and on February 20, 1949 (R. 3) charges were filed against Dennis and

Burns respectively, and they were separately tried and convicted by military courts-martial (R. 3). Their trials were conducted in an atmosphere of hysteria and terror created by both the military and civil authorities on Guam (R. 4). In this connection it should be pointed out that petitioners are Negroes and Ruth Farnsworth was white.

The request of petitioner Dennis for counsel of his choice was denied (R. 12). Defense attorneys were not appointed for him until April 8, 1949, and he did not have the opportunity to receive the advice of counsel until shortly before his trial convened on May 9, 1949 (R. 13). At his trial, the involuntary confessions made by him to the civil authorities were received in evidence despite his repudiation of them and testimony as to their involuntary character (R. 12). Evidence tending to show his innocence was suppressed (R. 12); some witnesses were solicited by the prosecution to perjure themselves (R. 12), while others who sought to help petitioner were intimidated and threatened (R. 12); and manufactured evidence was admitted and used against him at the trial (R. 13).

Petitioner Burns was not furnished counsel, nor allowed to obtain the advice of counsel until one day before his trial (R. 3). Important evidence in his favor was suppressed (R. 4); and testimony against him by Calvin Dennis has since been repudiated as being perjury suborned by the prosecution (R. 4).

The convictions and sentences of the courts-martial were approved by the convening authority (R. 1), and the records forwarded to Washington, D. C., for appellate review in the Office of the Judge Advocate General, United States Air Force (R. 2). The appellate proceedings provided by the military establishment were completed by petitioners when on January 28, 1952, their petitions for new trials were denied by the Judge Advocate General and the sentences of death were ordered executed (R. 2).

Having thus exhausted all available remedies provided by the military, petitioners filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia (R. 1). The convictions and sentences were attacked as void and beyond the jurisdiction of the military courts-martial because of gross irregularities, improper and unlawful practices amounting to a deprivation of fundamental rights guaranteed to petitioners by the Fifth and Sixth Amendments to the United States Constitution and by the Articles of War (R. 4-5). Respondents, without controverting the allegations in the petitions, moved to discharge the rules to show cause and dismiss the petitions on the ground that they failed to state a claim upon which the relief sought could be granted in that the petitions did not state requisite jurisdictional facts (R. 5-8). Upon consideration of these motions, and without factual inquiry, the District Court on April 10, 1952, filed memorandum opinions sustaining respondents' position (R. 18), and on April 17, 1952, entered orders discharging the rules to show cause and dismissing the petitions (R. 20).

Petitioners appealed to the United States Court of Appeals and on July 31, 1952, that court, one judge dissenting, affirmed the judgment of the District Court (R. 57). On September 19, 1952, an order was issued by this Court staying execution of sentences of death imposed pending timely filing and disposition of petitions for writ of certiorari.

Specifications of Error

The court below erred:

1. In refusing to order a hearing on the merits in the district court on petitioners' allegations of denial of fundamental due process by military authorities.

2. In refusing to make its own independent evaluation of the merits of petitioners' claimed denial of constitutional rights in the conduct of the military proceedings.

3. In refusing to hold that these courts-martial lost jurisdiction in permitting the prosecution to use evidence which had been illegally obtained by civil authorities to abet the conviction of these petitioners.

Reasons For Allowance of the Writ

1. This Court has never expressly determined whether violations of the guarantees of fundamental due process in court-martial proceedings can be corrected in a habeas corpus proceeding. The question is one of great importance to the administration of military justice. Moreover, recent opinions of this Court lend support to both a broad and a narrow view of the reach of habeas corpus in this area. As a result there is considerable confusion and uncertainty in the federal courts.

Early cases set forth the rule that the scope of habeas corpus is limited to a test of the jurisdiction of the tribunal rendering judgment. *Ex Parte Lange,* 18 Wall 163; *Ex Parte Siebold,* 100 U. S. 371. Thus, a federal district court, in a habeas corpus proceeding, could only determine whether the judgment was void for want of jurisdiction. This test was applied by this Court to convictions had in state and federal trial courts as well as in courts-martial. See *Ex Parte Siebold,* supra; *Ex Parte Royall,* 117 U. S. 241; *United States* v. *Grimley,* 137 U. S. 147.

In the case of state and federal convictions, however, the reach of habeas corpus has been gradually expanded in a number of landmark decisions. This has been accomplished conceptually by two different approaches. In one

line of cases the concept of jurisdiction has been widened. In *Moore* v. *Dempsey*, 261 U. S. 86, it was recognized that a trial dominated by mob hysteria constituted a denial of due process and was thus absolutely void. In *Johnson* v. *Zerbst*, 304 U. S. 458, where a petitioner had been denied the right to counsel in violation of the Sixth Amendment, this Court held that the trial court thereby lost jurisdiction. As recently as *Sunal* v. *Large*, 332 U. S. 174, it was indicated that a denial of the protection of the Fifth Amendment was "jurisdictional" in nature. See also *Lisenba* v. *California*, 314 U. S. 219, 237.

In a second line of cases, lack of jurisdiction and denial of due process have been considered as two separate and distinct grounds for habeas corpus. *Mooney* v. *Holohan*, 294 U. S. 103 (involving the knowing use by state authorities of perjured testimony), pointed the way by holding that such a conviction could be attacked in habeas corpus proceedings as a denial of due process. More recently, in *Waley* v. *Johnston*, 316 U. S. 101, where the petitioner alleged that his plea of guilty had been coerced, this Court recognized both lack of jurisdiction and denial of due process as bases for the issuance of a writ of habeas corpus.

Irrespective of whether denial of due process has been embraced in an expanded concept of jurisdiction or whether it has been considered as a separate basis for the issuance of the writ of habeas corpus, little confusion has resulted in the area of federal and state convictions. Both approaches have led to the same result. See *Behrens* v. *Hironimus*, 166 F. 2d 245 (C. A. 4th 1948); *Graham* v. *Squier*, 132 F. 2d 681 (C. A. 9th 1942), cert. den. 318 U. S. 777.

With respect to the scope of habeas corpus in the case of court-martial convictions, however, there has been considerable confusion and uncertainty. This Court has never expressly declared that a court-martial conviction in vio-

lation of the guarantees of due process can be corrected in a habeas corpus proceeding, either on the theory of *Johnson* v. *Zerbst*, supra, or the theory of *Waley* v. *Johnston*, supra.

In *Wade* v. *Hunter*, 336 U. S. 684, the same test used in civil cases was applied in determining whether petitioner's conviction by a court-martial was in violation of the double jeopardy provision of the Fifth Amendment. Since it was found that petitioner had not been placed in double jeopardy, it was unnecessary to decide whether a court-martial's overruling of a plea of former jeopardy may be subject to attack in habeas corpus proceedings. In *Humphrey* v. *Smith*, 336 U. S. 695, it was indicated that a court-martial trial not fairly conducted could be collaterally attacked in habeas corpus proceedings. There, Mr. Justice Black stated at page 701:

> "This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War."

The two most recent cases, *Whelchel* v. *McDonald*, 340 U. S. 122, and *Hiatt* v. *Brown*, 339 U. S. 103, reiterated the rule that the scope of habeas corpus proceedings is limited to an inquiry into the jurisdiction of the court-martial. Both cases, however, indicate the concept of jurisdiction has been expanded in this area also. In *Whelchel* v. *McDonald*, supra, this Court said that a court-martial proceeding which denied to an accused the right to tender the issue of insanity would be divested of its jurisdiction, but refused to decide whether a denial of due process by a court-martial offers a separate and independent ground to support a petition for habeas corpus. Mr. Justice Douglas, at page 124, stated:

> "We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction."

Dicta in other opinions have intensified the uncertainty in this area. In *Johnson* v. *Eisentrager*, 339 U. S. 763, 783, this Court stated that, "American soldiers conscripted into the military service are thereby stripped of their Fifth Amendment rights * * *." Similar expressions can be found in *Ex Parte Quirin*, 317 U. S. 1, 40, 45.

This confusion and uncertainty has been reflected in the opinions of district courts and courts of appeals. Dicta in *Ex Parte Quirin*, supra, led the Court of Appeals for the Second Circuit to declare that the Fifth and Sixth Amendments are inapplicable to a court-martial. *United States* v. *Crystal*, 131 F. 2d 576, 577 n. 2 (CA 2d 1943), cert. den. 319 U. S. 755.[1] In *In re Wrublewski*, 71 F. Supp. 143, the District Court for the Northern District of California, confronted with a petition alleging conviction by a court-martial in violation of the double jeopardy provisions of the Fifth Amendment, held that it lacked jurisdiction, relying on *Ex Parte Quirin*, supra; *Ex Parte Milligan*, 71 U. S. 2; *United States* v. *Crystal*, supra. On appeal the court assumed for the purpose of the decision, that the provision was applicable. *Wrublewski* v. *McInerney*, 166 F. 2d 243 (CA 9th 1948).

Other courts have acted similarly, apparently reluctant in the absence of a clear pronouncement from this Court

---

[1] But *cf. United States* v. *Swenson*, 165 F. 2d 756 (C. A. 2d 1948); *Becker* v. *Webster*, 171 F. 2d 762 (C. A. 2d 1949), cert. den. 336 U. S. 968.

to expressly hold that habeas corpus was available to correct violations of due process. See *Schita* v. *King*, 133 F. 2d 283 (CA 8th 1943); *De War* v. *Hunter*, 170 F. 2d 993 (CA 10th 1948), cert den. 337 U. S. 908; *Waite* v. *Overlade*, 164 F. 2d 722 (CA 7th 1947), cert. den. 334 U. S. 812.

On the other hand, the Court of Appeals for the Third Circuit, in *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (CA 3d 1944), expressly held that an individual does not lose the protection of the Fifth Amendment because he has joined the armed forces and that a civil court in a habeas corpus proceeding may determine whether the court-martial proceeding was in accord with standards of due process.

The decisions in the instant case are typical of this confusion. The District Court dismissed the petition, holding that it lacked jurisdiction to inquire into alleged denials of fundamental due process. The Court of Appeals, while refusing to issue the writ, concluded that habeas corpus is available to correct a denial of due process by military authorities. Its opinion also illustrates the difficulty of resolving this issue in the absence of a clear pronouncement by this Court.

The vital importance of this question to the administration of military justice need not be belabored. Millions of American citizens—members of the armed forces as well as civilians—are now subject to military jurisdiction. The present state of international affairs gives every indication that our armed forces will not be reduced for many years. Military law can no longer be looked upon as a mere instrument for the maintenance of discipline. With so many Americans now affected and likely to be affected in the future, the time is ripe for a clear-cut determination by this Court that those subject to military jurisdiction are not beyond the reach of the protective guarantees of the Federal

Constitution, and that where constitutional guarantees have been abridged under military law, resort may be had to a civil court to secure that protection which the Constitution affords to all American citizens.

2. The decision of the Court of Appeals in not remanding the case to the district court for a hearing is in conflict with *Walker* v. *Johnston*, 312 U. S. 275 and *House* v. *Mayo*, 324 U. S. 42.

Petitioners allege that they were convicted in outrageously unfair proceedings. Buttressed by affidavits of disinterested persons, the petitions for writs of habeas corpus make out cases of grave denials of due process. Respondents denied none of these allegations. Hence, it was incumbent upon the District Court and the Court of Appeals to assume the allegations to be true. *House* v. *Mayo*, supra. Since the District Court held no hearing to determine the validity of petitioners' allegations, the Court af Appeals should have remanded the cause for hearing on the merits. Its failure to do so constituted serious error. *Walker* v. *Johnston*, 312 U. S. 275. There the Court stated in an opinion by Mr. Justice Roberts at page 287:

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard."

a. Both petitioners allege that they were arrested by the civil police authorities of Guam on January 7, 1949, and that they were held without arraignment by any authority until January 17, 1949. During this time they were

held incommunicado and subjected to continuous questioning; they were also beaten, denied sleep and deprived of edible food. They were not allowed to consult counsel despite their requests (R. 2-3, 10-11; Affidavits of Grimmett, Herman Dennis, Daly and Hill). Further, their detention was in violation of Sections 686, 825 and 780 of the Penal Code of Guam.

Petitioner Dennis further alleges that as a result of physical and mental duress, four confessions were extracted from him on January 11th, 12th and 13th and were introduced against him at his trial. All the confessions were repudiated before, at and after the trial. If these allegations are true, the confessions were clearly coerced and their use at the trial constituted a denial of due process. *Chambers* v. *Florida*, 309 U. S. 227; *Watts* v. *Indiana*, 338 U. S. 49.

The uncontradicted facts as revealed by the court-martial record lead to the inescapable conclusion that the confessions were involuntary. One of the chief witnesses for the prosecution, Albert E. Riedel, a police investigator brought from California, testified that the murder of Ruth Farnsworth had created an atmosphere of extreme tension on Guam (Herman Dennis, C. M. Trans. 207). In this atmosphere a large group of Negro soldiers were asked to take lie detector tests in connection with the investigation with respect to this crime (Herman Dennis, C. M. Trans. 217). Petitioner Dennis submitted to the test on January 7 and was thereafter immediately arrested without being informed of its results. He was held incommunicado until after four confessions were extracted (Herman Dennis, C. M. Trans. 193, 221). After occasional questioning on January 7, 8 and 10th and prolonged questioning on January 11 by two interrogators working in shifts, petitioner Dennis made his first confession (Herman Dennis, C. M.

Trans. 188-200). It should be noted that petitioner Dennis was only 20 years old, with a limited education; he was a member of the armed forces, thousands of miles from home, and accused of a most heinous crime (*United States* v. *Dennis*, 4 A. C. M. 872, 906). In the light of these facts, we submit, the involuntary character of these confessions is clearly established. *Malinski* v. *New York*, 324 U. S. 401; *Ward* v. *Texas*, 316 U. S. 547; *White* v. *Texas*, 310 U. S. 530.

The Court of Appeals disposed of petitioner's allegation concerning these confessions on the theory that their involuntariness was a disputed issue of fact which had been decided adversely to petitioner. It accepted the determination of the military without making an independent evaluation of the evidence for itself. This Court, however, has emphasized that it will make an independent examination of the record to determine the validity of a claim that a coerced confession was used to convict. *Lisenba* v. *California*, supra. Even assuming *arguendo* that the uncontradicted facts do not necessarily lead to a conclusion that the confessions were coerced, the allegations of the petition, considered against the background of the uncontradicted facts, entitled petitioner to a hearing on the merits and to an independent determination by the court of the character of these confessions.

b. Petitioner Dennis also alleges that certain pubic hairs taken from his person during his unlawful detention, and without his being advised of his constitutional rights, were used against him at his trial (R. 12). This, we submit, is compulsory self-incrimination in violation of the Fifth Amendment. See *Rochin* v. *California*, 342 U. S. 165. The Court of Appeals, however, ignored this allegation.

c. Petitioner Dennis further alleges that specimens of his pubic hair presented at the trial were deliberately

planted in an effort to create evidence tending to establish his guilt (R. 13; Affidavit of Herman Dennis). Such conduct on the part of the prosecution would certainly constitute a flagrant violation of due process under the general principles enunciated by this Court in *Mooney* v. *Holonan*, 294 U. S. 103 and *Pyle* v. *Kansas*, 317 U. S. 213. The Court of Appeals disposed of this allegation on the ground that so long as a disputed question of fact had been presented to the duly constituted military authorities, it had no duty to consider it. Again, we submit, that as to this allegation petitioners were entitled to a hearing on the merits in the District Court. Petitioners urge that at the very least the Court of Appeals was required to evaluate the evidence independent of the conclusion reached by military authorities.

d. Both petitioners allege that important evidence relating to Filipino dog-tags and a navy uniform found near the scene of the crime was suppressed by the prosecution (R. 4, 12; Affidavit of Daly). If the allegations are true, these convictions are in violation of the Fifth Amendment. *Mooney* v. *Holonan*, supra; *Pyle* v. *Kansas*, supra.

The Court of Appeals disposed of this on alternative grounds. First, it asserted that the affidavit of Lt. Col. Daly in support of the allegation was insufficient in that it did not show that the prosecution had knowledge of the Filipino dog-tags and the navy uniform. Since the affidavit of Lt. Col. Daly avers that both items were in the possession of the Guam Police Department, and the records in these cases reveal that there was an intimate working relationship between the civil government of Guam and the Air Force, petitioners contend that the civil government acted here as the agent of the Air Force and its knowledge must be imputed to the Air Force. See *Anderson* v. *United States*, 318 U. S. 350 and *Gambino* v. *United States*, 275 U. S. 310. Compare *Gallegos* v. *Nebraska*, 342 U. S. 55, 70.

The alternative holding of the Court of Appeals was that a federal court had no duty to consider this allegation since it was based on a disputed question of fact which had already been presented to the duly constituted military authorities. Again, we submit, petitioners were entitled to a hearing on the merits in the District Court, and that at the very least the Court of Appeals was required to evaluate the evidence independent of the conclusion reached by military authorities.

e. Petitioner Dennis avers that the prosecution sought to procure witnesses to perjure themselves and intimidated and threatened those who sought to help him (R. 12; Affidavits of Grimmett, Daly and Hill). As the dissenting opinion of Judge Bazelon pointed out, the allegation of attempts to suborn perjury is given specific content by the affidavit of witness Mary Hill. She avers that one of the prosecution's chief investigators tried to induce her to make a false statement before the court-martial relating to the voluntariness of Dennis' confession. Moreover, the Judge Advocate General of the Air Force admitted that there was substantial evidence that Mrs. Hill was prevailed upon by the prosecution's investigator to make a false statement (*United States* v. *Dennis*, 4 A. C. M. 872, 906).

Chaplain Grimmet avers that military authorities interfered with his efforts to obtain assistance and counsel for petitioners. Furthermore, Lt. Col. Daly asserts, that as Staff Judge Advocate of the Marianas Air Material Command, he had personal knowledge of the fact that the Chaplain's cables and mail to the United States were intercepted and not delivered to the addressees.

Although the allegations, if true, would render the convictions void, *Mooney* v. *Holonan*, supra; *Pyle* v. *Kansas*, supra, they were ignored by the Court of Appeals.

f. Petitioner Burns alleges that the testimony of Calvin Dennis was coerced and perjured (R. 3-4; Affidavits of Daly and C. Dennis). Calvin Dennis was the principal witness appearing against him: without this testimony, the case against petitioner would be weak indeed. Affiant Calvin Dennis admits that he committed perjury under physical coercion, threats and promises. Corroborating this is the affidavit of Lt. Col. Daly wherein he states that he was present when an officer authorized to act on behalf of the Commanding General promised Calvin Dennis that his sentence would be commuted if he testified against petitioners, and threatened that he would be sentenced to death if he failed to do so.

If the above allegations are true, no court could avoid the compelling conclusion that the convictions were contrived and therefore void. See *Mooney* v. *Holonan*, supra; *Pyle* v. *Kansas*, supra.

The Court of Appeals disposed of this allegation also on the ground that it had no duty to examine the merits of a contention based on a disputed question of fact which had been resolved by the duly constituted military authorities. As previously stated, we take the position that this was error.

g. Petitioner Dennis alleges a gross abuse of discretion in the denial by his commanding officer of counsel of his choice (R. 12; Affidavits of Grimmett, Daly and Hill). The record shows that petitioner Dennis requested Lt. Col. Daly to act as his defense counsel and the Commanding General, after first granting the necessary permission later denied the request. Lt. Col. Daly alleges that charges against him were contrived so that he might be made "unavailable." Affiant Hill asserts that an investigator for the prosecution attempted to induce her to give false testi-

mony at the trial upon the promise that it would be helpful to Col. Daly "who was then in serious difficulties because of his attempt to defend the accused."

Petitioner Burns had only one day to consult counsel of his choice (R. 4). It is true that he was represented by duly appointed defense counsel, but in view of the seriousness of the crime, we submit, his trial should have been continued in order to permit counsel of his choice to adequately prepare his defense.

While this Court has never ruled that such a flagrant abuse of discretion constitutes a jurisdictional defect or violates due process, it is submitted that such conduct on the part of the commanding officer deprives the proceeding of any semblance of fundamental fairness. See *Hiatt* v. *Brown*, supra. The opinion of the Court of Appeals completely side-steps the essence of this contention.

The Articles of War in force at the time of these court-martial proceedings accorded the accused the right to counsel of his own choice if such counsel is reasonably available. A. W. 17. That petitioners may have had adequate counsel does not cure the fact that they were denied the counsel of their own choice by a flagrant abuse of discretion. Similarly, the fact that petitioners may have had competent counsel to prosecute their appeals to the Board of Review and Judicial Counsel is likewise irrelevant. Both petitioners were deprived of effective counsel of their choice by a gross abuse of discretion on the part of military authorities.

f. Petitioners allege that the atmosphere surrounding the trial was one of hysteria and terror (R. 4). This is supported by the affidavit of Chaplain Grimmet who asserts:

> "That the feeling was so tense on the Island and the rumor so strong that there was going to be a riot if

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 29 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, Secretary of Defense, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL,
Counsel for Petitioners.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
CHARLES W. QUICK,
HERBERT O. REID,
JAMES A. WASHINGTON, JR.,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

> the accused were not convicted, that I called the matter to the attention of Col. Tolin who said they were aware of the situation and that riot troops had been alerted in case of violence."

If these allegations are true, the convictions are void. *Moore* v. *Dempsey*, 261 U. S. 86.

The Court of Appeals was of the opinion that no fact shown in the record supported this general allegation. While this may be true,[2] it is proper for a petition of habeas corpus to rely on facts outside the record. *Johnson* v. *Zerbst*, supra; *Waley* v. *Johnston*, supra. Petitioners were entitled to a hearing on the merits in the District Court and the Court of Appeals erred in not remanding the cause for that purpose.

Even assuming *arguendo* that petitioners' rights to a hearing could have been satisfied had the Court of Appeals considered their petitions on the merits, the consideration given by the Court of Appeals to these cases can hardly be deemed a hearing. The fact that the Court of Appeals examined the records and wrote a lengthy opinion may tend to create the illusion that petitioners were afforded a hearing. But the hearing to which these petitioners were entitled necessitated an independent determination by the Court of Appeals of all issues relating to alleged violations of constitutional due process by military authority.

3. This Court should grant certiorari to determine whether the Court of Appeals was correct in holding that the doctrine of exhaustion of remedies as applied to state

---

[2] But see the court-martial record of Herman Dennis at page 207.

convictions supplied an accurate analogy for the instant fact situation.[3]

The Court of Appeals, while holding that an accused before a court-martial is entitled to a fair trial within due process of law concepts, placed upon the military authorities the principal responsibility for insuring such fairness. It concluded that habeas corpus will not lie "to review questions raised and determined, or raisable and determinable, in the established military process, unless there has been such gross violation of constitutional rights as to deny the substance of a fair trial and, because of some exceptional circumstances, the petitioner has not been able to obtain adequate protection of that right in the military processes." It analogized the doctrine of exhaustion of military remedies to that of exhaustion of state remedies, relying on the statement by this Court in *Ex Parte Hawk*, 321 U. S. 114, 118 that a federal court will not ordinarily re-examine upon habeas corpus questions adjudicated by state courts, except where resort to those courts "has failed to afford a full and fair adjudication of the federal contentions raised."

a. Even if it be assumed *pro arguendo* that the Court of Appeals was correct in its analogy, the Court should clarify the confusion relative to the application of the doctrine of *Ex Parte Hawk* to a collateral attack on military convictions.

---

[3] While this Court in *Gusik* v. *Schilder*, 340 U. S. 128, did indicate that the analogy was a proper one, the Court was there concerned only with the first aspect of the rule—namely that except in exceptional circumstances, a federal court will not entertain a petition for a writ on habeas corpus on behalf of one in state custody unless he has exhausted all state remedies, including an appeal or writ of certiorari from this Court. *Gusik* v. *Schilder* had no application at all to the second aspect of the rule of *Ex Parte Hawk* discussed *infra* at page 20.

The doctrine of *Ex Parte Hawk* has a twofold aspect. The first part of the rule states that federal district court will not ordinarily entertain a petition for a writ of habeas corpus from a prisoner in state custody until he has exhausted all state remedies, including the filing of a petition for a writ of certiorari in this Court.[4] The second aspect of the rule relates to the scope of habeas corpus after all of these state remedies have been exhausted.

The application of the latter portion of the *Ex Parte Hawk* rule has been subject to considerable uncertainty and there exists a conflict among the circuits. The Courts of Appeals for the Fourth and Tenth Circuits have held that where petitioner's contentions have been adjudicated on the merits by the state courts and this Court has denied certiorari, a district court is justified in granting the writ of habeas corpus only in unusual circumstances. *Goodwyn* v. *Smith*, 181 F. 2d 498 (C. A. 4th 1950); *Gault* v. *Burford*, 173 F. 2d 813 (C. A. 10th 1949). On the other hand, the Court of Appeals for the Third Circuit under the same circumstances has held that a district court must hear and determine the petition on the merits. *United States* v. *Baldi*, 192 F. 2d 540 (C. A. 3d 1951), cert. grant. 343 U. S. 903. There Judge Goodrich said at 544:

> "Each point raised by the relator is to be tested by whether it alleges a violation of rights under the United States Constitution: nothing more. That these allegations have been decided on the merits by the highest state court is a fact to be given weight by a District Court in passing upon petitions for habeas corpus. But the fact does not relieve the federal court of the duty to pass upon the merits of the petition."

---

[4] Sec. 28, U. S. C. § 2254.

This confusion with respect to the application of the doctrine of *Ex Parte Hawk* is multiplied manifold when the doctrine is transplanted from its home soil to a completely new area—collateral attack on military convictions. Since the *Baldi* case is now pending before this Court, it is especially appropriate that this related issue be decided.

If the view of the Third Circuit is correct, then clearly the Court of Appeals for the District of Columbia erred in the instant case by not remanding the cause to the District Court for a hearing. Even should the approach of the Third Circuit be rejected, the decision of the court below, it is submitted, is in conflict with *Moore* v. *Dempsey*, supra. There petitioner alleged that his trial was conducted in an atmosphere of mob hysteria and this Court held that the presence of a state appellate corrective procedure was not a sufficient ground for a federal court to refrain from examining the facts for itself. Mr. Justice Holmes stated at p. 91:

> "But if the case is that the whole procedure is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistable wave of public passion, and that the state courts failed to correct the wrong * * * perfection in the machinery for correction * * * [cannot] prevent this court from securing to the petitioners their constitutional rights."

When the allegations in the instant cases are considered in their totality, they paint a bleak picture—a proceeding nothing less than shocking which deprived the two accused of the most minimal standards of justice. If these allegations are true, the convictions stand exposed as contrived through a "pretense of a trial" and are as utterly void as the one considered in *Moore* v. *Dempsey*.

b. Appellants further submit that the Court of Appeals, in resolving the instant case by a rule analogous to the doctrine of exhaustion of state remedies, ignored the fact that collateral attack on military convictions brings into play many considerations which are significantly different from those pertinent to a collateral attack on state convictions.

First, an important aspect of the *Ex Parte Hawk* rule is that in exhausting state remedies, the petitioner must seek a writ of certiorari in this Court; *Darr* v. *Burford,* 339 U. S. 200. Thus, even before petitioning a federal district court for a writ of habeas corpus, one convicted by a state court has the right to ask this Court to grant certiorari. Those convicted by a military court-martial, on the other hand, have no similar right to ask this Court to review the proceedings. At the time petitioners were convicted, a writ of habeas corpus offered the only way for any kind of non-military review of the proceedings.

Second, underlying the rule of *Ex Parte Hawk* is the necessity for maintaining a harmonious federal-state relationship. *Darr* v. *Burford,* supra. A collateral attack on court-martial convictions, however, presents no such problem. Once military remedies are exhausted, it can hardly be considered unseemly for a federal district court to upset a determination by a military agency of the federal government.

Third, the court below completely ignored the tremendous differences between military and civil proceedings. The dangers of command control have been the subject of much concern. See Hearings Before Sub-Committee of the Committee on Armed Services on S. 857 and H. R. 4080; United States Senate, 81st Cong. 1st Session (1949); Farmer and Wells, Command Control—or Military Justice, 24 *N. Y. U. L. Q. Rev.* 263 (1949); Notes, 35 *Cornell L. Q.* 15 (1949); 2 *Stanford L. Rev.* 547 (1950). A fair and impartial trial

is obviously difficult in an atmosphere of command control. An officer who the commander believes is too lenient can be removed from service on courts; and defense counsel who is too successful may not remain a defense counsel very long. All the personnel connected with the trial are dependent on the commanding officer for assignments, leaves and positions. Cf. *Report of War Dept. Advisory Committee in Military Justice* (1946). Under these circumstances, officers are necessarily susceptible to command influence.

Similarly, the review procedure in force at the time of petitioners' convictions is a far cry from civilian standards. Review by the Judge Advocate General's department is review by a partially interested party. When as here, motions for new trials are presented to the Judge Advocate General, no hearing is held to permit a petitioner to prove his allegations, no counter-affidavits are submitted; the Judge Advocate General investigates the charges, satisfies himself as to the substance of the allegations, and there is no appeal from his decision. Such proceedings produce no record and a federal district court on habeas corpus must either accept the fairness of the proceedings as a matter of faith, or make an independent inquiry into the truth of the allegations.

In view of the above considerations, we urge this Court to grant the writ and hold that the limitations which some courts have placed on the writ of habeas corpus where state convictions are attacked should not apply to military convictions.[5] Where there are allegations of gross denials

---

[5] It has long been held that there is no presumption that a court-martial possessed jurisdiction, since it is a tribunal of limited jurisdiction. *McClaughry* v. *Deming*, 186 U. S. 49, 63. It would seem to follow logically from the above rule that a petitioner alleging such gross denials of due process which would oust the court-martial of its jurisdiction should have the right to prove his allegations in a civilian court.

of due process, as in the instant cases, it is the duty of the district court to make an independent inquiry into the facts.[6] If petitioners are denied their right to a hearing before a civilian court, their rights under the Fifth and Sixth Amendments become mere empty, hollow guarantees.

4. The use of evidence unlawfully obtained by the civil authorities of Guam impaired the jurisdiction of the court-martial proceedings. Petitioners were placed under arrest by the civil authorities on Guam. They were subject to the jurisdiction of the civil government of Guam.[7] Their detention was in flagrant violation of Sections 686, 780 and 825 of the Penal Code of Guam [8] which provide for arraignment before a judge within 24 hours and grant the prisoner on request the right to consult an attorney any time after arrest. As hereinbefore set out, it was during this period that petitioners were held incommunicado without process, denied counsel, subjected to physical and mental duress, and the confessions extracted. Had petitioners been tried by the civil authorities and had the evidence obtained during this period been used to convict them, the convictions clearly could not stand. See *McNabb* v. *United States* 318 U. S. 332; *Weeks* v. *United States*, 232 U. S. 358.

Convictions obtained by the Air Force with the use of such evidence can stand on no stronger ground. One arm of the federal government cannot reap the unlawful fruits of another arm. *Anderson* v. *United States*, 318 U. S. 350; *Gambino* v. *United States*, 275 U. S. 310. See *Gallegos* v. *Nebraska*, 342 U. S. 55, 70.

In the Anderson case appellants were tried and convicted in a federal district court for damaging federal

---

[6] See opinion of Chief Judge Biggs in *Hicks* v. *Hiatt*, 64 F. Supp. 238, 249, n. 27 (M. D. Pa., 1946).

[7] Penal Code of Guam (1947) Sec. 27.

[8] Penal Code of Guam (1947).

property. They had been arrested by local authorities, held incommunicado and denied counsel by local and state officers; and coerced confessions were extracted from some of them in violation of state procedure. Subsequently, they were arrested by federal officers and convicted on the basis of the illegal confession secured by the state and local officials. The Court, in reversing the conviction, declared at page 356:

> "There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers."

And, this Court in the *Gambino* case said at pages 316, 317:

> "the rights guaranteed by the 4th and 5th Amendments may be invaded as effectively by such cooperation, as by the state officers acting under direction of the Federal officials * * * The prosecution thereupon instituted by the Federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States."

Thus, we submit, the courts-martial were divested of jurisdiction by the use of evidence unlawfully obtained by the civil government during the period of petitioners' unlawful confinement, and these convictions cannot stand.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL,
Counsel for Petitioners.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
LEONARD W. SCHROETER,
of Counsel.

APPENDIX

Title 10, United States Code, Section 1488:

> * * * The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11 (Sec. 1482 of this title) * * *

Title 10, United States Code, Section 1495:

> * * * No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer, conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

Title 10, United States Code, Section 1542:

> * * * When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him * * *

Penal Code of Guam

Section 27. *Crimes, persons liable to punishment for.* —The following persons are liable to punishment under the laws of this Naval Government of Guam:

(1) All persons who commit, in whole or in part, any crime within this Island;

(2) All who commit any offense without this Island which, if committed within this Island, would be larceny, theft, robbery, or embezzlement under the laws of this Naval Government, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this Island;

(3) All who, being without this Island, cause or aid, advise or encourage, another person to commit a crime within this Island, and are afterward found therein;

(4) All who commit any offenses without this Island and outside the territorial jurisdiction of any other country, which if committed within this Island would be a felony, and the offender and body of the crime are subsequently found within this Island.

Section 686. *Right of defendant in criminal action.*— In a criminal action the defendant is entitled:

(1) To a speedy public and oral trial.

(2) To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

(3) To be informed of the nature and cause of the accusation against him.

(4) To be exempt from testifying against himself.

(5) To be allowed to testify in his own behalf; if he fails to testify, such failure shall not be construed as evidence against him; but if he does so testify, he may be cross-examined like other witnesses.

(6) To have compulsory process issue for obtaining witnesses in his favor.

(7). To produce and examine witnesses in his behalf and to be confronted with and to cross-examine any witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing judge and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the prosecution, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the Island; and except also that in the case of offenses hereafter committed the testimony on behalf of the prosecution or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot, with due diligence be found within the Island, given on a former trial of the action in the presence of the defendant who has, either in person, or by counsel, cross-examined or had an opportunity to cross-examine the witnesses may be admitted.

(8) To appeal.

Section 780. *Preliminary investigation by the police department. How, when, and where conducted. Powers of the chief of police, Island attorney to attend.*—(a) The conduct of the preliminary investigation as to procedure, time and place lie within the discretion of the chief of police of Guam. (b) For the purpose of investigating public offenses, the chief of police of Guam shall have the power to summon witnesses before him for questioning but shall

provide government transportation to persons so summoned from outlying districts. (c) Whenever any person accused of two public offenses is brought before the chief of police for investigating, such person:

(1) Shall be informed of the accusation against him.

(2) Shall be informed that any statement he may make, may be used against him.

(3) Shall not be compelled to be a witness against himself.

(d) Whenever the investigation indicates that a public offense has been committed triable in the courts of Guam other than in the police courts, the chief of police shall notify the Island attorney. The Island attorney or his deputy shall then attend the investigation by the police department.

Section 825. *Right of attorney to visit prisoner.*—The defendant must in all cases be taken before the judge without unnecessary delay, and, in any event, within 24 hours after his arrest excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of records of Guam may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested.

guard even when asserted by those whose purpose is the destruction of our institutions. For these reasons, we submit, the federal courts on habeas corpus should be held to have jurisdiction to determine whether fundamental constitutional prerequisites were complied with by military tribunals.

II.

The rule of judicial self-restraint applied by the court below is not appropriate to this case.

The Court of Appeals agreed with petitioners' basic contention that failure of a military tribunal to conduct its proceedings in a fundamentally fair way would render the validity of judgments subject to attack in habeas corpus proceedings. But it added, "habeas corpus will not lie to review questions raised and determined, or raisable and determinable, in the established military process, unless there has been such gross violations of constitutional rights as to deny the substance of a fair trial, and because of some exceptional circumstances petitioner has not been able to obtain adequate protection of that right in the military process" (R. 32). Thereupon, the court took up each of petitioners' allegations, determined that they had been either raised in the military process and had been decided against petitioners, or that the contentions were without substance, or were not jurisdictional. It then concluded that the facts before it did not depict the exceptional case.

1. On habeas corpus federal courts in state custody cases have adopted a rule of judicial self-restraint. See *Darr* v. *Burford*, 339 U. S. 200; *Coggins* v. *O'Brien*, 188 F. 2d 130 (C. A. 1st 1951); *Goodwin* v. *Smyth*, 181 F. 2d 498 (C. A. 4th 1950); *Schechtman* v. *Foster*, 172 F. 2d 339 (C. A. 2d 1949). See also Parker, Limiting

TABLE OF CONTENTS

	PAGE
OPINION OF COURT BELOW	1
JURISDICTON	1
STATEMENT	2
SPECIFICATION OF ERRORS	5
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I—The scope of inquiry on writ of habeas corpus extends to an examination of the military proceedings to determine whether basic constitutional guarantees have been violated	7
II—The rule of judicial self-restraint applied by the court below is not appropriate to this case	10
III—Even if the rule announced by the Court of Appeals is considered applicable to this case, petitioners were entitled to a hearing on the merits in the District Court	17
IV—The use by military authorities of evidence illegally secured in petitioners' courts-martial renders these convictions void	20
CONCLUSION	24

Table of Cases Cited

Adams v. United States, 317 U. S. 269	18
Anderson v. United States, 318 U. S. 350, 356	19, 21, 22
Batson v. United States, 137 F. 2d 299 (C. A. 10th 1943)	16
Becker v. Webster, 171 F. 2d 762 (C. A. 2d 1949)	8
Betts v. Brady, 316 U. S. 455	18
Brosius v. Botkin, 110 F. 2d 49 (C. A. D. C. 1940)	18

the Abuse of Habeas Corpus, 8 F. R. D. 171 (1949). It is this rule which here the court below held applicable to the instant case. Federal courts which have adopted this rule consider it essential to the maintenance of the delicate balance in the federal-state relationship involved in our federal system. *Darr* v. *Burford, supra*; *Coggins* v. *O'Brien, supra.* Whatever merits this rule of self-restraint may have in state custody cases,[5] the problems incident to the maintenance of the delicate balance between the United States and its courts and the state and its courts do not come into play, where, as here, a petitioner in federal custody applies to a federal court for a writ of habeas corpus. Thus, the reasons for the application of the federal rule of judicial self-restraint are not here present.

In state custody cases, moreover, before the state convictions can be subjected to collateral attack on habeas corpus in the federal courts they must have been reviewed or denied review by this Court on certiorari. Thus, an accused in a state court is afforded at least one opportunity for this Court to protect his rights before seeking a writ in the federal courts.

2. Courts-martial are courts of inferior and limited jurisdiction. *United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210; *Collins* v. *McDonald, supra.* No presumption of legality or validity attaches to court-martial judgments when they are under collateral attack, *Runkle* v. *United States*, 122 U. S. 543, and the grounds essential to the validity of the assailed authority must affirmatively be shown to have existed at the time of its exercise. *Givens* v. *Zerbst*, 255 U. S. 11; *Collins* v. *McDonald, supra; Waite* v. *Overlade, supra; Schita* v. *King, supra; Schita* v. *Cox, supra; Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (C. A. 8th 1929).

---

[5] Even as applied to state custody cases, however, this rule is now the subject of conflict among the circuits. See *United States* v. *Raldi*, 192 F. 2d 540 (C. A. 3d 1951); *cert. granted*, 343 U. S. 403.

If a denial of the substance of a fair trial renders the court-martial judgment subject to attack for invalidity on a habeas corpus, as the Court of Appeals indicates, and if the ingredients essential to the validity of the judgment must be affirmatively established, as the cited cases hold, it would seem to necessarily follow that it is the inescapable duty of the civil court to determine for itself whether those basic ingredients essential to the validity of the court-martial proceedings were in fact present. Such a determination cannot be left to military authorities. Thus, the expanded reach of the writ of habeas corpus, viewed in the light of the concept of limited jurisdiction, is at war with the rule of judicial self-restraint as applied here. See *Hicks* v. *Hiatt*, 64 F. Supp. 238, 249, 250, n. 27 (M. D. Pa. 1946).

3. Judicial scrutiny of military trials by federal courts is more essential than such scrutiny of state convictions. The state judiciary is an independent arm of government and is normally free from the pressures and influences of the executive and prosecuting officials. This is not true of military courts which are subject to command control. In fact it is a fair statement to say that this influence is considered the greatest weakness of military justice and has been the subject of much concern. In the *Report of the War Department Advisory Committee on Military Justice* (1946) (the Vanderbilt Report), at pages 6 and 7 this statement is found:

> "The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its preva-

PAGE

Carter v. McClaughry, 183 U. S. 365 7
Chambers v. Florida, 309 U. S. 227 20
Clawans v. Rives, 104 F. 2d 240 (C. A. D. C. 1939) 16
Coggins v. O'Brien, 188 F. 2d 130 (C. A. 1st 1951) ..10, 11, 16
Collins v. McDonald, 258 U. S. 416 .....7, 11

Darr v. Burford, 339 U. S. 200 .....10, 11, 18

Ex parte Reed, 100 U. S. 13 .....7, 14

Felts v. Murphy, 201 U. S. 123 7

Givens v. Zerbst, 255 U. S. 11 11
Glasgow v. Moyer, 225 U. S. 420 7
Glasser v. United, 315 U. S. 60 16
Goodwin v. Smyth, 181 F. 2d 498 (C. A. 4th 1950) 10

Henry v. Hodges, 171 F. 2d 401 (C. A. 2d 1948) 8
Hiatt v. Brown, 339 U. S. 103 ..... 8, 9
Hicks v. Hiatt, 64 F. Supp. 238, 249, 250, n. 27 (M. D. Pa. 1946) 12
Holiday v. Johnston, 313 U. S. 342, 350 .....16, 18
Humphrey v. Smith, 326 U. S. 695 8

Johnson v. Zerbst, 304 U. S. 458 .....7, 16

Keizo v. Henry, 211 U. S. 146 7
Kuykendall v. Hunter, 187 F. 2d 545 (C. A. 10th 1951). 8

Lisenba v. California, 314 U. S. 219, 236 19

McClaughry v. Deming, 186 U. S. 49 7
McNabb v. United States, 318 U. S. 332 .....19, 21, 22, 23
Montalvo v. Hiatt, 174 F. 2d 645 (C. A. 5th 1949) 8
Mooney v. Holohan, 294 U. S. 103 7
Moore v. Dempsey, 261 U. S. 86 7

Price v. Johnston, 334 U. S. 266 .....16, 18

Raymond v. Thomas, 91 U. S. 712, 716 15
Rochin v. California, 342 U. S. 165 19
Runkle v. United States, 122 U. S. 543 11

lence was not denied and indeed in some instances was frequently admitted. * * *

"So far as the committee is informed, no steps have been taken in the Army to check or prohibit commanding officers in the exercise of their power and influence to control the courts. Indeed the general attitude is expressed by the maxim that discipline is a function of command."

And the committee goes on to specifically recommend that:

"6. The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for a prompt trial to a court-martial appointed by a judge advocate should be absolute * * * The right of command to control the prosecution and to name the trial judge advocate, who should be a trained lawyer, should be retained. *The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of command*" (emphasis added).

The suggestion that appointing power be removed from command control, however, has never been incorporated in any revisions of military law.

While criticism of command influence normally concerns the relationship between the convening authority and the courts-martial, at least one authority, Professor Arthur John Keeffe, the former President of the General Courts-Martial Sentence Review Board of the United States Navy, feels that this influence renders even the highest judicial authority in the armed services a partisan rather than an impartial judicial officer. He said in testifying before a sub-com-

PAGE

Salinger v. Loisel, 265 U. S. 224 16
Schechtman v. Foster, 172 F. 2d 339 (C. A. 2d 1949) 10
Schita v. Cox, 139 F. 2d 971 (C. A. 8th 1944) 8, 11
Schita v. King, 133 F. 2d 283 (C. A. 8th 1943) 8, 11
Smith v. O'Grady, 312 U. S. 329 7
Sunal v. Large, 332 U. S. 174 7

Tarble's Case, 13 Wall. 397, 413-414 19

United States v. Baldi, 192 F. 2d 540 (C. A. 3d 1951); cert. granted 343 U. S. 403 ..... 11n
United States v. Hayman, 342 U. S. 205 .....19, 20
United States ex rel. Hirschberg v. Cooke, 336 U. S. 210 11
United States ex rel. Innes v. Hiatt, 141 F. 2d 664 (C. A. 3d 1944) 8, 16

Ver Mehren v. Sirmyer, 36 F. 2d 876 (C. A. 8th 1929) .. 11
Von Moltke v. Gillies, 332 U. S. 708 16

Wade v. Hunter, 336 U. S. 684 8
Waite v. Overlade, 164 F. 2d 722 (C. A. 7th 1947) 8, 11
Waley v. Johnston, 316 U. S. 101 .....7, 16
Walker v. Johnston, 312 U. S. 275 16
Watts v. Indiana, 338 U. S. 49, 54 .....18, 20
Weeks v. United States, 232 U. S. 383 22
Whelchel v. McDonald, 340 U. S. 122 ..... 8, 9
Wilfong v. Johnston, 156 F. 2d 507 (C. A. 9th 1946) 16
Wrublewski v. McInerney, 166 F. 2d 243 (C. A. 9th 1948) 8

Other Authorities Cited

Antineau, Habeas Corpus Relief from Courts-Martial Convictions, 28 Tex. L. Rev. 556 (1950) 8n

Antineau, Courts-Martial and the Constitution, 33 Marq. L. Rev. 25 (1949) 8n

mittee of the Senate Armed Services Committee on the proposed Uniform Military Code:

> "The Judge Advocate General is not, and by the very nature of his office and appointment, cannot be an impartial judicial officer. He is in as inconsistent a position as a commanding officer or convening authority. He is to enforce discipline and he is to give defense. It is for this reason that the English in their reforms have provided that the Judge Advocate General be a civilian appointed on the recommendations of the Lord Chancellor and be responsible to him.
>
> "Significantly, in order to reduce this conflict the English have removed the Judge Advocate General from the control of the Secretaries for State and Air * * *
>
> "To all intents and purposes there is no difference between the Judge Advocate General and a district attorney in civilian life." [6]

4. Military law is a system of articles, rules and regulations established for the government of persons in the military service. It deals in particularity with the maintenance of discipline, within the armed forces. See *Ex parte Reed, supra.* Since ordinary rules of law do not

---

[6] At page 252, *Hearing Before a Sub-Committee of the Senate Committee on Armed Services, United States Senate, on S. 857 and H. R. 4080,* 81st Congress, First Session. For other criticisms of Uniform Code of Military Justice for its retention of command influence, see also Keeffe and Moskin, Codified Military Injustice, 35 *Corn. L. Q.* 151 (1949); Langley, Military Justice and the Constitution-Improvements Afforded By the New Uniform Code of Military Justice, 29 *Tex. L. Rev.* 651 (1951); Snedeker, The Uniform Code of Military Justice, 38 *Geo. L. J.* 521 (1950); Note, Military Justice—A Uniform Code For The Armed Services, 2 *Wes. Res. L. Rev.* 147 (1950); Mullally, Military Justice: The Uniform Code in Action, 53 *Col. L. Rev.* 1 (1953).

PAGE

Earle, The Preliminary Investigation in the Army-Court Martial System—Springboard for Attack by Habeas Corpus, 18 Geo. Wash. L. Rev. 67 (1950) ... 8n

Hearing Before a Sub-Committee of the Committee on Armed Services, United States Senate, on S. 857 and H. R. 4085, 81st Congress, First Session ... 14n

Karlen and Pepper, The Scope of Military Justice, 43 J. Crim. L. 285, 298 (1952) ... 15n

Keeffe and Moskin, Codified Military Injustice, 35 Corn. L. Q. 151 (1949) ... 14n

Langley, Military Justice and the Constitution-Improvements Afforded By the New Uniform Code of Military Justice, 29 Tex. L. Rev. 651 (1951) ... 14n

Mullally, Military Justice: The Uniform Code in Action, 53 Col. L. Rev. 1 (1953) ... 14n

Manual for Courts-Martial, United States Air Force, 156-158 (1949) ... 21

Note, Military Justice—A Uniform Code For The Armed Services, 2 Wes. Res. L. Rev. 147 (1950) ... 14n

Paley, The Federal Courts Look at Courts-Martial, 12 U. of Pitt. L. Rev. 7 (1950) ... 8n

Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171 (1949) ... 10, 11

Report of the War Department Advisory Committee on Military Justice (1946) (The Vanderbilt Report), at pages 6 and 7 ... 12, 13

Stein, Judicial Review of Determinations of Federal Military Tribunals, 11 Brooklyn L. Rev. 30 (1941) ... 8n

Werfel, Military Habeas Corpus, 49 Mich. L. Rev. 593, 699 (1951) ... 8n

seek to cope with problems peculiar to the government of the military establishment, a special set of rules may well be indispensable in prosecuting exclusively military offenses. In such instances, courts-martial and military reviewing authorities may be more competent to determine questions involving military law, usage and internal administration and, therefore, it might be deemed illogical for civil courts to interfere with the determination of such questions by military tribunals. By the same reasoning it would seem crystal clear that civil courts are better qualified to resolve questions of constitutional and fundamental law arising in a criminal prosecution where the offense charged is not of a peculiarly military character and the accused may be tried by either the military or civil authority. "It is an unbending rule of law that the exercise of military power when the rights of the citizen [soldier] are concerned, shall never be pushed beyond what the exigency requires." *Raymond* v. *Thomas*, 91 U. S. 712, 716.[6]

So long as the military services were composed of professional soldiers, there may have been some logic in allowing the court-martial system to determine conclusively the meaning and application of constitutional provisions. Today military personnel is largely conscript and the system of "military justice is the largest single system of criminal justice in the nation. * * *"[7] In addition to their authority over exclusively military matters, military courts have jurisdiction to try all offenses triable in civil courts.

These considerations call for greater rather than less scrutiny by civil courts of military proceedings because the constitutional safeguards should mean the same things to soldiers and civilians. At the very least, the scope of inquiry by civil courts of court-martial convictions should

---

[7] Karlen and Pepper, The Scope of Military Justice, 43 *J. Crim. L.* 285, 298 (1952).

Statutes Cited

PAGE

Penal Code of Guam,
Section 686 ..... 2n, 3, 20
Section 780 ..... 2n, 3, 20
Section 825 ..... 2n, 20

Chapter 35 of the Civil Regulation With the Force and Effect of Law in Guam (1947) 22, 22n

IN THE

Supreme Court of the United States

October Term, 1952

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, Secretary of Defense, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

Opinion of Court Below

The opinion of the Court of Appeals (R. 21-56) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and was amended on August 25, 1952 (R. 58). Petition for writ of certiorari was filed on October 29, 1952 and was granted December 15, 1952 (R. 58). Jurisdiction of this Court rests on Title 28, United States Code, Section 1254, subsection 1.

Statement

Petitioners are Negro Americans and citizen soldiers now being held by military authorities at United States Air Force Far Eastern Command, APO 500 under sentence of death. On May 9, 1949, and on May 29, 1949, petitioners Herman Dennis, Jr. and Robert Burns were respectively tried and convicted for the rape murder of Ruth Farnsworth, a white civilian, by general courts-martial convened on the Island of Guam at Headquarters, 20th Air Force, APO 234.

The judgments of the courts-martial were approved by the convening authority, found legally sufficient by the Judge Advocate General's Board of Review and the Judicial Council, and the sentences of death were orderd executed by the President (R. 1, 2, 7, 8, 9, 10, 16, 17). Petitioners filed timely petitions for new trials with the Judge Advocate General, and on January 28, 1952, these petitions were denied (R. 2, 9).

At this point, all available remedies provided within the military establishment had been exhausted, and the present collateral attacks on the validity of the courts-martial judgments were instituted in the District Court.

On January 7, 1949, petitioners were surrendered to the custody of federal civil authorities on Guam by the United States Air Force (R. 2, 10).[1] Petitioner Robert Burns was held by civil authorities for several weeks incommunicado and without process in a death cell at the Agana Jail. He was subjected to continuous questioning, beaten and denied edible food in violation of the Constitution of the United States and the laws of Guam (R. 2, 3).[2]

---

[1] At that time the United States Navy was charged with administering the civil government of the Island of Guam.

[2] Penal Code of Guam, Sections 686, 780, 825. The text of these provisions is set out in an appendix to the petition for writ of certiorari at pp. 28-30.

He was not allowed to consult counsel during the entire period he was held by Guam authorities (R. 3). As a result of physical and mental duress, the other two accused—petitioner Herman Dennis and one Calvin Dennis—signed involuntary confessions implicating this petitioner in the crime for which he was ultimately convicted (R. 3).

On or about January 30, he was returned to the custody of the Air Force by civil authorities (R. 3). After the Air Force regained custody, continued pressure and intimidation was exerted by military authorities to extract a confession from him. Similar tactics were also used to get Calvin Dennis and Herman Dennis to testify against him (R. 3). These efforts did result in Calvin Dennis being a witness for the prosecution at petitioner's trial. That testimony has now been repudiated by Calvin Dennis as being false, perjured, and suborned by the prosecution (R. 4).

Burns was denied the right of consultation with counsel by military authorities until one day before his trial (R. 3), and important evidence tending to show his innocence was suppressed (R. 4). The entire proceedings were conducted in an atmosphere of hysteria and terror in violation of due process of law (R. 4).

Petitioner Herman Dennis was held incommunicado, without process and in solitary confinement in the Agana Jail by Guam police officers from January 7 until January 17, 1949. He too was subjected to continuous questioning, beaten and denied sleep and food (R.11). He was not allowed to consult counsel during the entire time he was held in the custody of the authorities of Guam (R. 11).

During the period of his detention by Guam authorities, he was not advised of his right against self-incrimination as required under Sections 686 and 780 of the Penal Code of Guam, Article of War 24 and the Fifth Amendment to the Constitution of the United States. He made four con-

fessions to police authorities between January 11 and January 14, which were the result of physical and mental duress, protracted interrogation, threats, promises and the use of a lie detector (R. 11). The texts of these confessions were dictated by police officers, and subsequently petitioner repudiated them as false (R. 11). Certain pubic hairs were taken from his person and subsequently used against him in violation of his right against self-incrimination under the laws of Guam, the Articles of War and the Constitution of the United States (R. 12).

On or about January 29, petitioner was returned to the custody of military authorities and was not afforded an opportunity to consult counsel until shortly before his court-martial trial which began on May 9, 1949 (R. 11). Evidence unlawfully obtained by Guam police was introduced against petitioner at his trial in violation of his rights under the Constitution and the Articles of War (R. 12). Irrelevant, immaterial and inflammatory statements deliberately calculated to prejudice petitioner's cause were also introduced (R. 12). Important evidence tending to show his innocence was suppressed (R. 12); the prosecution sought to procure witnesses to perjure themselves and intimidated and threatened those who sought to help this petitioner (R. 12). This trial was also conducted in an atmosphere of hysteria and terror (R. 12-13).

The above-stated allegations, supported by affidavits, were the bases for petitions for writ of habeas corpus filed in the District Court. Respondents filed motions to discharge the rule to show cause and dismiss the petitions on the ground that the petitions raised no questions reviewable by civil courts (R. 5-8, 15-18). The District Court, on April 10, 1952, granted the motions to dismiss (R. 18-20). Its opinions are reported at 104 F. Supp. 310, 312. The United States Court of Appeals for the District of Columbia Circuit, with one judge dissenting, affirmed the judgment on other grounds (R. 43). Whereupon, we brought the cause here.

Specifications of Errors

The Court of Appeals erred:

1. In not remanding the cause to the District Court for a hearing.

2. In prescribing a rule for entitlement to a hearing on the merits in habeas corpus proceedings which permits military authorities to effectively foreclose inquiry by civil courts into alleged violations of constitutional rights by courts-martial.

3. In refusing to hold that on habeas corpus a district court must make its own independent determination and evaluation of the evidence relating to the claimed invalidity of the judgment of the military tribunal.

Summary of Argument

The citizen-soldier being held on military authority under sentence of death pursuant to a court-martial conviction should have the right to attack that conviction on writ of habeas corpus on the ground that the military authorities violated his constitutional rights and denied him the substance of a fair trial. Where the petition for the writ makes out a *prima facie* case on this ground, entitlement to a hearing on the merits has been established. Indeed, in federal custody cases, the only prerequisites for a hearing on the merits are the showing on the face of the petition that there has been a denial of constitutional rights and that habeas corpus is the only effective remedy. In applying a different set of standards to this case, the Court of Appeals committed reversible error. Whatever merit its standards may have, the Court of Appeals, by not remanding the cause to the District Court for proceedings in the light of its decision, subverted its appellate jurisdiction, and its judgment should be reversed.

While federal courts on habeas corpus have imposed a rule of judicial self-restraint in many instances in state custody cases for the purpose of preserving the delicate federal-state balance, the bases upon which that rule rests are absent in the instant case. In state custody cases, when a petitioner seeks a writ in a federal court, his cause has already been extensively examined and reviewed by the state judicial machinery, and this Court has had an opportunity to review the cause on application for certiorari. This is not true in military cases for here petitioner's first contact with an independent judiciary occurs when he petitions the district court for the writ. Courts-martial are courts of limited jurisdiction; and where their judgments are attacked in federal courts, the duty is on the military authorities to affirmatively show that the military tribunals possessed the necessary ingredients for the rendition of a valid judgment. Under these circumstances, it is strange indeed to hold, as the Court of Appeals held, that federal courts on habeas corpus cannot look behind the military determination and independently inquire whether, in fact, the military judgment was valid.

The allegations in these petitions, viewed in their totality, establish a shocking picture of deviations from civilized concepts of justice. Unless petitioners are entitled to invoke the federal process to secure the protection which the Constitution affords citizens and soldiers alike, military courts will be free to treat persons within their jurisdiction in any fashion they desire. Since petitioners have made uncontroverted allegations which if true would clearly show a denial of the substance of a fair trial, they are entitled to a hearing on the merits in the District Court.

ARGUMENT

I.

The scope of inquiry on writ of habeas corpus extends to an examination of the military proceedings to determine whether basic constitutional guarantees have been violated.

The early cases involving collateral attacks on both military and civil convictions in habeas corpus proceedings were limited to narrow and formalistic notions of jurisdiction, *i.e.*, whether the ingredients essential to a valid assumption of jurisdiction existed. *Collins* v. *McDonald*, 258 U. S. 416; *Glasgow* v. *Moyer*, 225 U. S. 420; *Keizo* v. *Henry*, 211 U. S. 146; *Felts* v. *Murphy*, 201 U. S. 123; *McClaughry* v. *Deming*, 186 U. S. 49; *Carter* v. *McClaughry*, 183 U. S. 365; *Ex parte Reed*, 100 U. S. 13. See Mr. Justice Frankfuter concurring in *Sunal* v. *Large*, 332 U. S. 174. More recently, in civil cases, the scope of inquiry has been extended to ascertain whether the conviction has occurred in disregard of constitutional guarantees. *Waley* v. *Johnston*, 316 U. S. 101; *Smith* v. *O'Grady*, 312 U. S. 329; *Johnson* v. *Zerbst*, 304 U. S. 458; *Mooney* v. *Holohan*, 294 U. S. 103; *Moore* v. *Dempsey*, 261 U. S. 86. While lagging behind this expanded reach of the writ as to civil cases, lower federal courts in the past decade have begun to hold that on writ of habeas corpus a civil court is empowered to examine the military proceedings to determine whether specific constitutional rights were violated and whether the trial was in accord with fundamental notions of fairness implicit in our concept of due

process of law.[3] *Kuykendall* v. *Hunter*, 187 F. 2d 545 (C. A. 10th 1951); *Wrublewski* v. *McInerney*, 166 F. 2d 243 (C. A. 9th 1948); *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (C. A. 3d 1944); *Schita* v. *Cox*, 139 F. 2d 971 (C. A. 8th 1944); *Schita* v. *King*, 133 F. 2d 283 (C. A. 8th 1943); see also *Montalvo* v. *Hiatt*, 174 F. 2d 645 (C. A. 5th 1949); *Becker* v. *Webster*, 171 F. 2d 762 (C. A. 2d 1949); *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2d 1948); *Waite* v. *Overlade*, 164 F. 2d 722 (C. A. 7th 1947).

This Court has indicated in recent decisions, at least by inference, that on writ of habeas corpus a civil court may appropriately inquire into whether guarantees of due process have been observed by the military tribunal. *Whelchel* v. *McDonald*, 340 U. S. 122; *Humphrey* v. *Smith*, 336 U. S. 695; *Wade* v. *Hunter*, 336 U. S. 684. While *Hiatt* v. *Brown*, 339 U. S. 103 on which respondents relied in the lower court appears to be a restatement of the

---

[3] This expanded scope of inquiry on writ of habeas corpus into whether the military trial violated petitioners' constitutional rights has been the cause of considerable comment. See Earle, The Preliminary Investigation in the Army-Court Martial System—Springboard for Attack by Habeas Corpus, 18 *Geo. Wash. L. Rev.* 67 (1950); Antineau, Habeas Corpus Relief from Courts-Martial Convictions, 28 *Tex. L. Rev.* 556 (1950), Antineau, Courts-Martial and the Constitution, 33 *Marq. L. Rev.* 256 (1949) for discussion in favor of review of military judgments by civil courts on writ of habeas corpus extending to determine whether constitutional safeguards had been observed. But see Werfel, Military Habeas Corpus, 49 *Mich. L. Rev.* 593, 699 (1951); Stein, Judicial Review of Determinations of Federal Military Tribunals, 11 *Brooklyn L. Rev.* 30 (1941); Paley, The Federal Courts Look at Courts-Martial, 12 *U. of Pitt. L. Rev.* 7 (1950) for arguments in favor of limiting the scope of inquiry by civil courts on writ of habeas corpus to formalistic and technical concepts of jurisdiction.

narrow, formalistic view of the permissible scope of inquiry,[4] it is there indicated that gross abuse of discretion with regard to the 8th Article of War would give rise to a defect in the jurisdiction of the military tribunal making it subject to collateral attack on writ of habeas corpus. Moreover, *Hiatt* v. *Brown,* when viewed in the light of *Whelchel* v. *McDonald,* gives little support to the notion that the proceedings of a military tribunal conducted in violation of constitutional rights are not subject to collateral attack.

The Court of Appeals is correct, we submit, in holding that on habeas corpus civil courts may examine military proceedings in order to determine whether a petitioner was accorded fundamental fairness. Therefore, insofar as the holding of the lower court sustains the right of a civil court to inquire into whether the military trial was conducted in compliance with constitutional guarantees, we think the court below is correct and that such a rule should be expressly adopted by this Court.

All persons tried in our civil courts are protected by the Constitution and may attack their convictions by habeas corpus on the ground that their trials failed to conform to requisite constitutional standards. It would be strange indeed if American citizen soldiers, whose primary duty is to defend our country and to preserve our democracy, are deprived of rights which our courts will scrupulously

---

[4] The Court did say at page 110; "We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation and the competence of the law member and defense counsel." None of these questions are involved in this case, and this statement cannot be taken to mean, at least without explicit clarification by the Court, that no due process questions can be raised on habeas corpus.

not be restricted by a rule of judicial self-restraint where the conviction complained of is for an offense not exclusively violative of military discipline or administration.

5. In applying its rule of judicial restraint the Court of Appeals concluded that inasmuch as the Judge Advocate General had determined petitioners' allegations an insubstantial basis for new trial, the District Court was precluded from making any contrary determination of their sufficiency. Since this conclusion cannot be based upon other vital considerations as in the state custody cases, petitioners submit that it is patently predicated upon a principle indistinguishable from res judicata and ignores this Court's admonition that res judicata is not applicable in habeas corpus proceedings. *Salinger* v. *Loisel*, 265 U. S. 224; *Waley* v. *Johnston*, *supra* at page 105.

6. This case involves solely federal habeas corpus jurisdiction of federal custody cases. Where a case involves persons in custody of federal authorities, the rule to be applied requires but two determinations: (1) whether the petition on its face alleges facts, which if proved, would establish a denial of a constitution right, and, (2) whether habeas corpus is the only effective means of preserving such rights. See *Glasser* v. *United States*, 315 U. S. 60; *Johnson* v. *Zerbst*, *supra*; *Wilfong* v. *Johnston*, 156 F. 2d 507 (C. A. 9th 1946); *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (C. C. A. 3d 1944), and *Batson* v. *United States*, 137 F. 2d 299 (C. A. 10th 1943). Therefore, here it was incumbent upon the Court of Appeals to order a hearing on the merits in the District Court to provide petitioners with the opportunity to establish the truth of their assertions. See *Von Moltke* v. *Gillies*, 332 U. S. 708; *Johnson* v. *Zerbst*, *supra*; *Clawans* v. *Rives*, 104 F. 2d 240 (C. A. D. C. 1939); and see *Coggins* v. *O'Brien*, *supra*. *Cf. Price* v. *Johnston*, 334 U. S. 266; *Holiday* v. *Johnston*, 313 U. S. 342; *Walker* v. *Johnston*, 312 U. S. 275.

III.

Even if the rule announced by the Court of Appeals is considered applicable to this case, petitioners were entitled to a hearing on the merits in the District Court.

1. In the District Court, respondents' motions to discharge the rule to show cause and dismiss the petitions (R. 5-8, 15-18) and that court's opinions and judgments (R. 18-20) were directed to one issue: whether the permissible scope of the court's inquiry on a petition for writ of habeas corpus was limited to considerations of the lawful composition of the courts-martial before which petitioners were tried, jurisdiction of their person and offense, and the lawfulness of the sentences imposed. On appeal, this was the only question presented and argued.

The Court of Appeals below specifically passed on this question, stating in its opinion (R. 25):

> "Appellants say that the recent decisions of the Supreme Court have 'expanded' the concept of 'jurisdiction' for purposes of determining the right to habeas corpus. *That is correct* * * *" (emphasis supplied)

and further (R. 31):

> "We proceed, then, upon the premise that the protection of the Fifth and Sixth Amendments apply to courts-martial, except for the specific exception in the Fifth and the historic meanings at common law of the terms used in both amendments * * *."

It is petitioners' contention that at this point that the Court of Appeals, having determined that the District Court erroneously limited the scope of its jurisdiction to exclude consideration of a habeas corpus petition alleg-

ing violation of fundamental due process, erred in failing to remand the cause for application of the rule which it held to be dispositive of the petition.

United States Courts of Appeals have no original jurisdiction in habeas corpus proceedings. Title 28, United States Code, Section 2241. See *Adams* v. *United States,* 317 U. S. 269; *Brosius* v. *Botkin,* 110 F. 2d 49 (C. A. D. C. 1940). Since this is true, and because Title 28, United States Code, Section 2243, specifically provides that the court, justice or judge to whom an application for a writ of habeas corpus is made shall pass upon its sufficiency, it is evident that the Court of Appeals is incompetent to initially determine the sufficiency of such applications.

In the interest of justice, this Court and other federal courts have long disregarded legalistic exactitude in the examination of applications for the writ. Thus, even though the petition is insufficient in substance, it may be amended. See *Darr* v. *Burford,* 339 U. S. 200; *Holiday* v. *Johnston,* 313 U. S. 342, 350. Consequently, in considering propositions and matters which had not been considered, developed or determined by the District Court and in summarily precluding the possibilities of amendment, answer, traverse and hearing provided in Title 28, United States Code, Section 2243, the Court of Appeals subverted its appellate review in a manner which this Court regards as reversible error. See *Price* v. *Johnston, supra.*

2. Petitioners' allegations make out a *primie facie* case of denial of the substance of a fair trial by military authorities. A proper appraisal of petitioner's contention can only be obtained by viewing the allegations in their totality. *Betts* v. *Brady,* 316 U. S. 455. Viewed as a whole, petitioners' allegations paint a shocking picture of injustice highlighted by the "pressure of unrelenting interrogations" which this Court condemned in *Watts* v.

Indiana, 338 U. S. 49, 54; a working arrangement between two arms of the government in derogation of the rights of the accused which was denounced in *Anderson* v. *United States,* 318 U. S. 350, 356; "a plain disregard of the duty enjoined by Congress upon federal law officers" as defined in *McNabb* v. *United States,* 318 U. S. 332, 344; acts invading the privacy of an accused which in *Rochin* v. *California,* 342 U. S. 165 was described as "conduct which shocks the conscience." These factors, projected against a background which includes subornation of perjury, deprivation of counsel and favorable witnesses, suppression of evidence, the introduction of prejudicial and inflammatory testimony and the conduct of the trials in an atmosphere of mob hysteria and terror, renders inescapable the conclusion that "the whole proceeding is a mask", *Moore* v. *Dempsey,* 261 U. S. 86, 91, and that petitioners' trials lacked "that fundamental fairness essential to our concept of justice". *Lisenba* v. *California,* 314 U. S. 219, 236.

If these circumstances do not warrant issuance of the writ, it is difficult to conceive what additional ingredients are necessary to merit classification as the "exceptional case." Indeed, if, as the Court of Appeals concluded, the circumstances shown do not picture the denial of the substance of a fair trial, if the allegations are insufficient to affect the fundamental fairness of the courts-martial, and if the disposition accorded petitioners' claims does not impair the validity of the subsequent military appellate determinations sufficient to characterize this as an "exceptional case", petitioners submit that adherence to the rule applied by the Court of Appeals effectively accomplishes suspension of the writ of habeas corpus in cases involving solider citizens in violation of Article I, Section 9, Clause 2 of the Constitution. See *Tarble's Case,* 13 Wall. 397, 413-414. *Cf. United States* v. *Hayman,* 342 U. S. 205. Furthermore, it cannot be said in habeas corpus arising out of court-martial convictions that the rule merely operates to "minimize the difficulties encountered in habeas corpus

hearings by affording the same rights in another and more convenient forum'' *United States* v. *Hayman, supra.*

This is the type of case with which this Court and the federal courts have dealt with on innumerable occasions. A Negro is accused of a crime of passion or violence against a white woman. Such accusations test the strength of our constitutional guarantees. This Court, however, has evolved standards and restraints which must be observed in order to prevent convictions under such circumstances from being acts of tyranny and injustice rather than the impartial application of the law. See *Chambers* v. *Florida,* 309 U. S. 227; *Watts* v. *Indiana, supra.* We submit, the military proceedings here violated all standards of civilized judicial conduct, and that petitioners should have been allowed to prove in the District Court the merits of their contentions.

IV.

The use by military authorities of evidence illegally secured in petitioners' courts-martial renders these convictions void.

As the facts reveal, petitioners were released by military authorities to custody of the civil authorities of Guam, jailed and held incommunicado by the latter without process for a prolonged period of time. This procedure was in clear violation of Sections 686, 780 and 825 of the Penal Code of Guam, which guarantee to the accused the right and visitation of counsel, privilege against self incrimination, and protection against detention by police authorities without process.

In our view these provisions were applicable to all persons within the jurisdiction of that government. Had petitioners been tried by the civil authorities and if the evidence obtained by the civil police under the circumstances set forth here had been introduced at their trials, the convic-

tions would unquestionably be invalid under the rule stated by this Court in *McNabb* v. *United States, supra.*

The Court of Appeals dismissed this argument on the ground that the *McNabb* rule was merely a rule of evidence. But this, we submit, does not dispose of petitioners' contention. The question posed is whether courts-martial may lawfully use evidence illegally obtained by another arm of the federal government. The 38th Article of War, which was in effect at the time these courts-martial took place, provides that the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States shall apply insofar as the President deems them practicable. Rule 124 provides that insofar as not otherwise prescribed in the Manual, the rules of evidence generally recognized in the trial of criminal cases in district courts shall be applied. *Manual for Courts-Martial, United States Air Force* 150 (1949). Thus, in the absence of any contrary regulations the courts-martial should have applied the rules in use in the district court and evidence unlawfully obtained should not have been admitted. See *McNabb* v. *United States, supra.* The fact that civil authorities unlawfully obtained the evidence introduced at the courts martial does not make such evidence admissible. *Anderson* v. *United States, supra.*

Rule 127, which specifically deals with the subject of admissibility of confessions, contains nothing which expressly negatives the applicability of the *McNabb* and *Anderson* rules to courts-martial. *Manual for Courts-Martial, United States Air Force* 156-158 (1949). In fact the rule can well be interpreted as adopting the *McNabb* principle. Rule 127 states that: "No statement, admission, or confession of an accused obtained by use of *coercion* or *unlawful influence* shall be received in evidence in any courts-martial." (emphasis supplied). The use of the phrase "coercion or unlawful influence" clearly implies that "unlawful influence" constitutes something in addition to "coercion." Certainly the term "unlawful influ-

ence" might well refer to a confession obtained during a period of unlawful detention.

It should be noted here that in other instances where the courts-martial Manual intends to render inapplicable to courts-martial a particular federal rule, this intention is expressed in no uncertain terms. For example, Rule 138 makes lawful a search of property owned or controlled by the United States when authorized by the commanding officer having jurisdiction over the locality where the property is located. This rule was intended to limit the application of the doctrine of *Weeks* v. *United States*, 232 U. S. 383, to courts-martial. But no such express provision negatives the applicability of the *McNabb* and *Anderson* rules to military proceedings.

The military reviewing authorities disregarded this contention on the ground that Chapter 35 of the Civil Regulations With the Force and Effect of Law in Guam (1947) operated with regard to military personnel in lieu of Sections 825 and 847-849 of the Penal Code of Guam.[8]

---

[8] Chapter 35 provides:

"1. Whenever a member of the military forces of the United States is arrested by civil authorities, the offender shall be taken to the police station where the charge shall be investigated. If the charge is considered substantial, he may then be released upon his own cognizance or turned over to military authorities. Should the chief of police consider the charge of a sufficiently serious nature so that special action is necessary or that the release of the offender would be detrimental to his own or the public welfare, the offender may be held pending action on the report of the chief of police to military authority.

"2. The chief of police will, within 24 hours of the arrest, forward a report to the commanding officer of the offender and will set forth therein the offense alleged, such details as may be necessary to permit the commanding officer to take intelligent action on the case, and the names of such witnesses as may be available. He will also forward one copy of this report to the office of the Governor, for file."

It should be noted at the outset that neither the Civil Regulations nor the Penal Code expressly authorize Chapter 35 to operate in lieu of the Penal Code in cases involving military personnel. Moreover, it is submitted, Chapter 35 can have no application to this case.

The plain meaning of this chapter is that its provisions shall be followed when military personnel are initially apprehended by civil authorities on Guam. In the instant case, petitioners were actually surrendered by the military to officials of the civil government. This fact in itself serves to render Chapter 35 inapplicable here, for it can have no possible meaning in the context of this case.

Further, the record makes it clear that both the military and the civil officers contemplated that petitioners would be tried by civil authorities. The very fact that the military released petitioners strongly leads to this inference. But even more persuasive is the revelation at pages 227, 232 of the court-martial record of petitioner Herman Dennis that he was actually arraigned before a magistrate after confessions were extracted from him. Under these circumstances, neither the military nor the civil authorities can now validly claim that the protections afforded by the Penal Code of Guam were inapplicable to these petitioners.

The rule of the *McNabb* case is much more than an important rule of evidence. It represents the expression of a strong policy that federal courts cannot convict an accused on the basis of evidence obtained during a period of prolonged unlawful detention and interrogation. The use of such evidence would vitiate any conviction in a federal court. Petitioners submit that the use of such evidence by these courts-martial and the failure of the reviewing authorities to correct this clear error of law vitiates their convictions.

Conclusion

WHEREFORE, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause remanded for a hearing on the merits.

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL,
Counsel for Petitioners.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
CHARLES W. QUICK,
HERBERT O. REID,
JAMES A. WASHINGTON, JR.,
of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
DEC 5 1952

No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE; THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE; GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
1. Unlawful detention	6
2. Coerced confessions	7
3. Denial of counsel of petitioners' choice, or effective assistance of counsel	9
4. Suppression of evidence	11
5. Perjured testimony	11
6. Trial in an atmosphere of terror	13
Argument	14
Conclusion	24
Appendix	25

CITATIONS

Cases:

Ahrens v. *Clark*, 335 U.S. 188	2
Burall v. *Johnston*, 134 F. 2d 614, certiorari denied, 319 U.S. 768	21-22
Carter v. *Woodring*, 92 F. 2d 544, certiorari denied, 302 U.S. 752	17
Close v. *United States*, 198 F. 2d 144, No. 130 Misc., O.T. 1952, certiorari denied November 13, 1952	22
Cobb v. *Hunter*, 167 F. 2d 888, certiorari denied, 335 U.S. 832	23
Coggins v. *O'Brien*, 188 F. 2d 130	16, 17, 20
Darr v. *Burford*, 339 U.S. 200	17, 19, 20, 24
Dynes v. *Hoover*, 20 How. 65	17
Frank v. *Mangum*, 237 U.S. 309	16, 24
French v. *Weeks*, 259 U.S. 326	20
Gault v. *Burford*, 173 F. 2d 813	16
Goodwin v. *Smyth*, 181 F. 2d 498	16
Grafton v. *United States*, 206 U.S. 333	18
Grimley, In re, 137 U.S. 147	18
Gusik v. *Schilder*, 340 U.S. 128	17
Hawk, Ex parte, 321 U.S. 114	16, 24
Hiatt v. *Brown*, 339 U.S. 103	18
Johnson v. *Eisentrager*, 339 U.S. 763	2
Kennedy, United States ex rel. v. *Tyler*, 269 U.S. 13	16, 24
McClaughrey v. *Deming*, 186 U.S. 49	18

Cases—Continued

	Page
Maoney v. Holohan, 294 U.S. 103	16, 23
Moore v. *Dempsey*, 261 U.S. 86	16, 17
Morton v. *Welch*, 162 F. 2d 840	22
Powers v. *United States*, 223 U.S. 303	22
Reaves v. *Ainsworth*, 219 U.S. 296	20
Schechtman v. *Foster*, 172 F. 2d 339, certiorari denied, 339 U.S. 924	16, 20, 24
Setser v. *Welch*, 159 F. 2d 703, certiorari denied, 331 U.S. 840	22
Smith v. *United States*, 187 F. 2d 192, certiorari denied, 341 U.S. 927	21
United States v. *Baldi*, 192 F. 2d 540, certiorari granted, 343 U.S. 903	16
United States v. *Burns*, 4 CMR (AF) 907	24
United States v. *Dennis*, 4 CMR (AF) 872	23, 24
United States v. *Freeman*, 167 F. 2d 786, certiorari denied, 335 U.S. 817	22
United States v. *Hiatt*, 141 F. 2d 664	20
United States v. *Klinger*, 136 F. 2d 677, certiorari denied, 320 U.S. 746	22
Valdez v. *United States*, 244 U.S. 432	23
Whelchel v. *McDonald*, 340 U.S. 122	24
Wild v. *Oklahoma*, 187 F. 2d 409	23
Wilson v. *United States*, 162 U.S. 613	22

Constitution and Statutes:

United States Constitution, Art. 1, § 8, cl. 14	18
Articles of War, as amended by the Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627:	
Art. 47 [10 U.S.C., Supp. II, 1518(c)]	25
Art. 48 [10 U.S.C., Supp. II, 1519]	25
Art. 49 [10 U.S.C., Supp. II, 1520]	26
Art. 50 [10 U.S.C., Supp. II, 1521]	26
Art. 53 [10 U.S.C., Supp. II, 1525]	28
Art. 92 [10 U.S.C., Supp. II, 1564]	29
United States Code:	
28 U.S.C. 2255	21
50 U.S.C., Supp. V, §§ 576-660 64 Stat. 113-132 (formerly 10 U.S.C. 1474-1525, 41 Stat. 788-800)	18
50 U.S.C., Supp V, § 663, 64 Stat. 132 (formerly 10 U.S.C. § 1522, 41 Stat. 797, as amended 50 Stat. 724, 56 Stat. 732)	18

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 422

ROBERT W. BURNS AND HERMAN P. DENNIS, JR., PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE; THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE; GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the District Court are reported at 104 F. Supp. 310 and 312 (R. 18-20). The majority and dissenting opinions of the Court of Appeals (R. 21-44, 44-56) are as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and amended on August 25, 1952 (R. 58). The petition for a writ of certiorari was filed on October 29, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on petitions for habeas corpus alleging violations of due process in court-martial proceedings, petitioners were entitled to a hearing on factual issues which had been examined and found groundless in the military appellate processes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 25-29.

STATEMENT

Petitioners, citizen members of the United States Armed Forces, seek review of the judgment of the court below, which affirmed the orders of the United States District Court for the District of Columbia dismissing, without hearing, their several petitions for writs of habeas corpus against respondents (R. 1-5, 9-15); under whose authority petitioners are in custody of Headquarters, Japan Logistical Command, APO 503, awaiting execution of death sentences imposed by courts-martial following conviction for rape and murder.[1] They contended in their

[1] Petitioners, although outside the territorial jurisdiction of any federal court, seem to have "standing to invoke the process of federal courts somewhere." *Johnson* v. *Eisentrager*, 339 U.S. 763, 790; compare *Ahrens* v. *Clark*, 335 U.S. 188

respective habeas corpus petitions that their detention was unlawful because the courts-martial, having denied them due process as a result of certain alleged irregularities in the conduct of their trials, had lost jurisdiction over them.

From the habeas corpus petitions and the responses to rules to show cause the following facts appear:

On December 11, 1948, petitioners Burns and Dennis were serving as Staff Sergeant and Private, respectively, in the United States Air Force, assigned to the 12th Air Ammunition Squadron at Guam, Marianas Islands (R. 1, 9, 18). On February 1, 1949, Dennis was charged with a violation of the 92nd Article of War, in two specifications, as amended on April 14, 1949, alleging, respectively, that on December 11, 1948, on the Island of Guam, he did rape and "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill" one Ruth Farnsworth, "by grievously beating, tearing, and abusing her person" (R. 11, 16; ACM 1892, Dennis (BR), 4 CMR (AF) 872, 873-874; Resp. Ex. C).[2] The same charge and specifications were filed against Burns on February 20, 1949 (R. 3, 6-7; ACM 1893; Burns (BR), 4 CMR (AF) 907, 909; Resp. Ex. C).[3] Dennis was tried by general court-martial, duly convened at Headquarters, Twentieth Air Force, Guam, from 9th to

[2] The citation refers to volume 4 of the Court Martial Reports of the Judge Advocate General of the Air Force, hereinafter referred to as CMR (AF).

[3] Same as fn. 2, *supra*.

16th of May, 1949 (R. 16, 18; 4 CMR (AF) 872, 873; Resp. Ex. C). Burns was tried by general court-martial, composed of different officers, duly convened at Headquarters, 19th Bombardment Wing, Medium, Guam, from 27th to 30th of May, 1949 (R. 6, 18; 4 CMR (AF) 907, 909; Resp. Ex. C). They were both found guilty of the offenses charged and sentenced to death (R. 1, 7, 9, 16, 18; 4 CMR (AF) 872, 874, 907, 909; Resp. Ex. C).

The trial proceeding in each instance was approved, following a review in accordance with provisions of AW 47, by the Staff Judge Advocate of the convening authority, the Twentieth Air Force, which then forwarded the trial records to The Judge Advocate General, United States Air Force, at Washington, for appellate review pursuant to provisions of AW 50 (R. 1-2, 7, 9-10, 16, 18-19; Resp. Exs. A, B). On November 21, 1949, the Board of Review, in the office of The Judge Advocate General, after a review of Dennis' court martial proceedings following the submission of a brief and oral argument by one of his present counsel, found that "no error injuriously affecting the substantial rights of the accused was committed during the trial" and approved it (R. 16-17, 18-19; Resp. Ex. C; 4 CMR (AF) 872, 904; Resp. Ex. C). After a similar submission of a brief and oral argument on behalf of Burns by one of his present counsel, a Board of Review, consisting of different members, affirmed his court-martial proceedings on March 14, 1950 (R. 7, 18-19; Resp. Ex. C; 4 CMR (AF) 907, 923). The Judicial Council, in the office of The

Judge Advocate General, after the submission of separate briefs and oral arguments on behalf of each petitioner by one of their present counsel to the effect "that the conviction should not be permitted to stand because the record shows violation of" their "fundamental individual rights," approved all prior proceedings against Dennis and Burns on July 18, and August 18, 1950, respectively (R. 17, 7; Resp. Ex. D; 4 CMR (AF) 888, 892, 904, 923, 926, 927).

Subsequently, in view of a series of correspondence on behalf of petitioners, containing "allegations which if true would reflect adversely upon the fundamental fairness of" their trials, and because of the gravity of the sentences, The Judge Advocate General, United States Air Force, in his "capacity as supervisor of the administration of military justice generally," had "requested the Office of Special Investigations, Office of The Inspector General, to make a complete investigation of these matters" (R. 17-18; Resp. Ex. E; 4 CMR (AF) 905-906, 928-929). Later, in transmitting pursuant to provisions of AW 50(d)(1) the records of the appellate review accorded petitioners to the Secretary of the Air Force, The Judge Advocate General reported that "the most comprehensive investigation of the Office of Special Investigations disclosed nothing which would warrant my recommending disapproval of the sentence" of either petitioner (Resp. Ex. E; 4 CMR (AF) 906, 929).[4] On August

[4] The reports of the independent investigation were also forwarded to the Secretary of the Air Force (4 CMR (AF) 929).

3, 1951, the President of the United States confirmed petitioners' sentences and ordered their execution by the Commanding General, Far East Air Force (R. 8, 17, 18-19; Resp. Ex. F; 4 CMR (AF) 907, 930). Thereafter, petitioners, pursuant to provisions of 50 U.S.C., Supp. V, 660 (formerly AW 53), filed with the Judge Advocate General their petitions for a new trial which contained essentially the same allegations presented in their respective petitions for habeas corpus (R. 8, 17, 19, 2, 10; Resp. Ex. G). The Judge Advocate General appointed a board of officers, who heard the arguments of petitioners' counsel, and considered all the evidence presented (Resp. Ex. G). On January 28, 1952, the Judge Advocate General, after considering the memoranda of the board of officers and after reexamining petitioners' entire trial records and the independent investigations conducted at his request as against the allegations set forth in their petitions, denied petitioners' requests for a new trial (R. 8, 17-18; Resp. Ex. G).

Specifically, the petitions for habeas corpus raised the following issues which were disposed of by the various military reviewing authorities as indicated:

1. *Unlawful detention.* Petitioners alleged that on January 7, 1949, upon their arrest by military authorities, they were placed in custody of civil authorities on Guam, where, without arraignment, they were held, incommunicado, not allowed to consult with counsel, "subjected to continuous ques-

tioning, beaten, denied sleep and edible food," in violation of the Penal Code of Guam and the United States Constitution, until their return to the custody of the Air Force several weeks later (R. 2-3, 10-11, 13). During such detention Dennis, "without being advised of his constitutional rights against self-incrimination had taken from his person certain pubic hairs which were subsequently used as evidence against him" (R. 12).

The Judge Advocate General concurred in the findings of the Judicial Council that at the time of their arrest petitioners were "not deprived of any right to a preliminary hearing before a committing magistrate or other like authority", because Guam at that time was under control of "a military government deriving its authority from the United States and administered by the Department of the Navy. * * * Chapter 35, 'Civil Regulations With the Force and Effect of Law in Guam' (United States Government Printing Office, 1947) provides for the detention of United States military personnel and with respect to such personnel, operates in lieu of Sections 825 and 847-849, Penal Code of Guam, which is applicable to other offenders" (4 CMR (AF) 888, 900; Resp. Exs. D, G).

2. *Coerced confessions:* Petitioners alleged that, as a "result of physical duress, protracted interrogation, the use of a lie detector, threats" and promises, and without being advised of his rights against self-incrimination, Dennis gave four confessions, which also implicated Burns (R. 11, 12, 13).

The facts set forth in the record of the trial do not show that Dennis, while in custody of the Guam authorities, suffered undue hardships or privations or that there was "any calculated endeavor on the part of officials to secure a confession through the pressure of unrelenting questioning" (4 CMR (AF) 885; Resp. Ex. C). The four statements made by Dennis while he was detained by the Guam authorities were received in evidence against him, only "after presentation to the court of much evidence with respect to the voluntary nature of these confessions, including petitioner's own sworn testimony as a witness in his own behalf, and his denial that physical force was used against him", together with testimony showing that he was warned of his constitutional rights (Resp. Exs. G, p. 8, C, D, 4 CMR (AF) 880-882, 885-886, 887, 889-892, 895-900). The evidence at the trial showed that after Dennis had signed his third confession, he re-enacted his part in the crime, pointing out to the investigators the exact route taken in the course of the crime, depicting the roles played by the participants together with all the details, which coincided in all major respects "to the facts and circumstances evidenced" by other testimony (4 CMR (AF) 880, 887; Resp. Exs. C, G).

Although petitioners together with other soldiers had voluntarily submitted to a "lie detector" test prior to their arrest, no confessions were made while they were undergoing such tests, nor were the results of the tests used in evidence (4 CMR (AF) 885; Resp. Ex. C).

3. *Denial of counsel of petitioners' choice, or effective assistance of counsel:* Petitioners alleged that counsel furnished Burns "had only one day to prepare his defense, thereby depriving petitioner of his right to effective counsel" (R. 4); and that Dennis was denied a "request for counsel of his choice," and the counsel furnished him "did not take adequate time to prepare" his defense (R. 12).

The record shows that prior to trial, petitioners were notified that Dennis' written request for the services of Lieutenant Colonel Daly as individual defense counsel could not be granted because by decision of the appointing authority "Lieutenant Colonel Daly was declared not available for such duty," and Colonel Daly himself advised Dennis that he could not "conscientiously defend" him (4CMR (AF) 883, 893; Resp. Exs. C, D). Thereafter, Dennis "signified his satisfaction with the regularly appointed defense counsel and stated that he did not desire the services of Lieutenant Colonel Daly" (*id.*). However, at the beginning of the trial, Dennis stated, "I desire the regularly appointed defense counsel but do wish to have Lieutenant Colonel Edward F. Daly to assist" (4CMR (AF) 882; Resp. Ex. C). The law member of the court "ruled that Lieutenant Colonel Daly was not available to serve as special defense" (4CMR (AF) 883; Resp. Ex. C). The Board of Review in examining Dennis' trial record found that the "official files of the Air Force available at Headquarters, USAF", showed "that at the time of trial the officer requested by the accused as individual defense

counsel was himself under charges involving misconduct, moral turpitude, drunkenness and disorderliness and the corrupt endeavor to obstruct and impede military justice *in the instant case and others allied therewith* and the unethical offer to abandon and withdraw from the defense of this accused and others provided he would be granted immunity from punishment for alleged prior acts of his own misconduct" (4 CMR (AF) 884, 892-895, 906; Resp. Exs. C, D, E, G). On the date of the trial, Daly's resignation from the service "was in the processes of military administration," since on April 19, 1949, he had tendered such resignation "for the good of the service, in lieu of trial by court-martial" on the various charges pending against him (*id.*).

"The record of trial reveals that" Dennis "was defended ably and vigorously by the regularly appointed defense counsel, all three of whom were qualified attorneys, admitted to the practice of law in their respective states and designated as judge advocates by the Chief of Staff, United States Air Force", and that they participated in the case since their assignment without knowledge that Dennis was willing to obtain Colonel Daly as special counsel after the original information to Dennis that Daly was unavailable for the requested assignment (4 CMR (AF), 884, 893-894; Resp. Exs. C, D).

As to Burns, the record indicates that he "was defended at the trial by counsel of his choice" (4 CMR (AF) 921-922; Resp. Ex. C). On the day of his trial, Burns, though present with his "regularly

appointed defense counsel", was granted a request to be represented by an officer of his own choosing, Captain Drucker, a member of the Judge Advocate's Corps and a qualified lawyer, as his individual counsel, while retaining two of the three regularly appointed defense counsel "to act as associate counsel" (4 CMR (AF) 921; Resp. Ex. C). Burns then stated that he was "satisfied" with such counsel. Neither he nor counsel of his choice requested a continuance of his trial (4CMR (AF) 921; Resp. Exs. C, G).

4. *Suppression of evidence:* Petitioners alleged that certain "important evidence tending to show" petitioners' innocence was suppressed by the prosecution (R. 4, 12).

The Judge Advocate General, in rejecting, as a ground for a new trial, the contention, "that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was withheld from the court," stated that "this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless" (Resp. Ex. G, p. 13).

5. *Perjured testimony:* Petitioners alleged that Calvin Dennis, who was also charged with the same offenses as petitioners, admitted in a sworn statement that his testimony at the trial, which alone directly connected Burns with the crimes charged, was perjured as a result of "threats and promises of special consideration if Calvin

Dennis agreed to testify against" Burns (R. 4, 3); that the prosecution "sought to procure witnesses to perjure themselves" against petitioner Dennis, "and intimidated and threatened those who sought to help" him (R. 12); that the trial record shows that specimens of hair obtained from Dennis "were deliberately planted in an effort to create evidence tending to show his guilt" (R. 13).

In view of the trial record and circumstances surrounding the case, The Judge Advocate General found that he could not place any credence in Calvin Dennis' affidavits repudiating his testimony given against Burns at the latter's trial (Resp. Ex. G.). The Judicial Council found that "the record discloses that the trial judge advocate and the law member used commendable care to assure that Private Calvin Dennis appeared as a witness voluntarily and that there was present no coercive influence which would cause him to tell other than the truth", and that their interrogation shows "conclusively that Private Calvin Dennis offered himself as a witness freely and voluntarily and that his testimony was given with a full and complete understanding of his rights, uninfluenced and uncolored by any threat or promise" (4 CMR (AF) 926, 921-922; Resp. Exs. C, D). During his repeated assertions that he was testifying voluntarily, Calvin Dennis "sustained himself through a searching cross-examination" by the defense (Resp. Ex. G, p. 8). The defense made an attack on the credibility of his testimony "by showing that he had made prior inconsistent statements," but he

explained "that those statements were influenced by threats made" by petitioners. The record shows that "Calvin Dennis' testimony was consistent in every respect with the corroborative evidence". (4 CMR (AF) 915-916; Resp. Ex. C.).

With respect to the assertions that the prosecution "intimidated and threatened those who sought to help" him, the Judge Advocate General found that "exhaustive" independent investigations did not substantiate such allegations (Resp. Ex. G).

6. *Trial in an atmosphere of terror*: Petitioners alleged that their trials were "conducted in an atmosphere of terror, hysteria and vengeance" (R. 4, 12-13).

The Board of Review, in reviewing Burns' record, found that the atmosphere on Guam was not such as to preclude a fair and impartial trial (4 CMR (AF) 922; Resp. Ex. C). "All members of the court were from organizations located at distant points from the Island of Guam" (*id.*). Burns' counsel cross-examined several of the members of the court to determine whether they possessed any preconceived opinion as to Burns' guilt or innocence, and declined to challenge any member for cause (*id.*).

The District Court, without affording petitioners a hearing, upon motions by respondents, dismissed the petitions for writs of habeas corpus, on the ground that they did "not state facts upon which the relief sought can be granted," because "The record here shows that extensive consideration was given to each of the matters asserted in support of

the relief sought in these proceedings, and the various military authorities who were charged with the responsibility of review determined such matters to be factually groundless" (R. 19-20).

On appeal, the Court of Appeals for the District of Columbia affirmed the judgments of the District Court (R. 57-58). It stated that, in accordance with its "frequent practice in capital cases," it had examined "the whole" of petitioners' long records, but concluded, "in agreement with the District Court, that the facts alleged in the petitions, viewed in the light of the return to the rule, do not supply grounds upon which the relief sought can be granted" (R. 43).

ARGUMENT

We submit that petitioners' extensive argument (Pet. 6-11) concerning the power of federal courts to correct, in habeas corpus proceedings, violations of the due process guarantees in court-martial proceedings, is not directly relevant to the issue involved herein. The decisions of the lower courts did not reject that proposition of petitioners. The district court denied petitioners' respective applications for writs of habeas corpus solely on the ground that they did "not state facts upon which the relief sought can be granted," because the pleadings showed that "the various military authorities who were charged with the responsibility of review," after having afforded them adequate opportunity to prove the very matters asserted in their habeas corpus petitions, "determined such

matters to be factually groundless" (R. 20). And the court below, in affirming the judgments of the district court, specifically recognized that the due process requirement of the Fifth Amendment is applicable to court-martial proceedings, which civil courts will reexamine, in a proper case, to determine whether the constitutional requirement had been met (R. 31). Thus, the only issue which confronted the court below involved "a problem of jurisdiction," raised by the question, "whether the allegations of the petitions, viewed in the light of the accompanying data and of the returns to the rules, are sufficient to invoke the jurisdiction of the court and to require a hearing on the merits" (R. 23).

Petitioners contend (Pet. 11-24), in effect, that they have an absolute right to such a hearing in a civil court, irrespective of the fact that, having availed themselves of the appellate machinery of the military authority for corrective action consistent with the constitutional due process requirement, they had failed to vindicate their constitutional claims. This contention is untenable. The court below correctly held that the general principles governing the reviewability by habeas corpus of state-court judgments are also applicable to such reviews of judgments of courts-martial. It is well established, generally, that where a petitioner has exhausted his remedies in a state court, wherein his constitutional questions had been considered and adjudicated on the merits, the federal court, ordinarily, will not re-examine upon a writ of habeas

corpus the questions thus adjudicated, unless under its peculiar organization, the state tribunal was unable to afford a constitutionally adequate process for relief, or some "exceptional circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U.S. 114, 117; *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17; *Coggins* v. *O'Brien*, 188 F. 2d 130, 133 (C.A. 1); *Goodwin* v. *Smyth*, 181 F. 2d 498 (C.A. 4); *Gault* v. *Burford*, 173 F. 2d 813 (C.A. 10); *Schechtman* v. *Foster*, 172 F. 2d 339 (C.A. 2), certiorari denied, 339 U.S. 924; cf. *Mooney* v. *Holohan*, 294 U.S. 103; *Moore* v. *Dempsey*, 261 U.S. 86, 91, 92.[5] Thus, if the corrective process of a non-federal tribunal is shown to be adequate for the protection of one's fundamental human rights and such protection had been accorded an accused in consonance with the constitutional due process requirement, federal courts will not interfere by habeas corpus. See *Moore* v. *Dempsey, supra;* see also *Frank* v. *Mangum*, 237 U.S. 309. This rule is predicated, primarily, upon

---

[5] Petitioners' contention (Pet. 19-21) that the application of this doctrine by the court below is not only in conflict with the decision in *United States* v. *Baldi*, 192 F. 2d 540, 544 (C.A. 3), certiorari granted, 343 U.S. 903, but with *Moore* v. *Dempsey*, 261 U.S. 86, is unfounded. The doctrine that a federal court in a habeas corpus proceeding involving an attack on a judgment of a state court could adopt the findings of the latter on the issues presented was not disputed in the *Baldi* case. There the court stated that the mere fact that matters averred in a federal petition for habeas corpus had "been decided on the merits by the highest state court is a fact to be given weight by a district court in passing upon petitions for habeas corpus. But that fact does not relieve the federal court of the duty to pass upon the merits of the petition" (192 F. 2d at 544). However, it is possible "to pass upon the merits of a petition" without a hearing thereon. Thus, what the court meant in the

the "respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours." *Coggins* v. *O'Brien,* 188 F. 2d 130, 133 (C.A. 1); see *Darr* v. *Burford,* 339 U.S. 200, 205. For this reason, petitioners would limit the applicability of the rule to judgments of state courts (Pet. 22). But the desirability of preserving the historical and constitutional separation of the civil and military powers is at least as good a reason for holding the rule applicable to habeas corpus proceedings involving judgments of military tribunals. See *Gusik* v. *Schilder,* 340 U.S. 128, 131-132. The courts-martial and the judicial powers of the United States, although deriving their respective authority from the Constitution, are, nevertheless, independent of each other. *Dynes* v. *Hoover,* 20 How. 65; *Carter* v. *Woodring,* 92 F. 2d 544 (C.A. D.C.), certiorari denied, 302 U.S. 752. The courts-martial are established under the constitutional

---

Baldi case was that a federal court could not arbitrarily deny a habeas corpus petition merely because the issues raised therein had been adjudicated by a state court, but that it could adopt the findings of the state court and consider them against the allegations of the petition, which could be done without a hearing, as it was in the instant case.

In *Moore* v. *Dempsey, supra,* the record showed that the existing corrective process of the state was inadequate to correct the alleged wrongs, because mob hysteria had permeated not only the trial procedure but the entire state judicial system, including its appellate processes, as well as the executive branch of the government, so that the federal court could not in good faith adopt the findings of the state court. Under the circumstances in that case, it was the duty of the federal court to hold a hearing in order, as this Court stated, to "find whether the facts alleged are true and whether they can be explained so far as to leave the state proceeding undisturbed" (261 U.S. at 92).

power of Congress "To make Rules for the Government and Regulation of the" armed forces of the United States. U. S. Constitution, Art. 1, § 8, cl. 14. Under this specific grant of power, Congress has provided for trial and appellate procedures, including process for new trial, with respect to military offenses. 50 U.S.C. §§ 576-660, 64 Stat. 113-132 (formerly 10 U.S.C. §§ 1474-1525, 41 Stat. 788-800). As stated in *Grafton v. United States*, 206 U.S. 333, 347-448, "Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers * * *." See *Hiatt v. Brown*, 339 U.S. 103, 110; *In re Grimley*, 137 U.S. 147. Although it has been held in *McClaughry v. Deming*, 186 U.S. 49, 63, that courts-martial are of special and limited jurisdiction, their judgments, when affirmed by the required reviewing authority, are nevertheless "final and conclusive," just as those of any state court, and hence "binding upon all departments, courts, agencies, and officers of the United States," subject only to review upon collateral attack in habeas corpus. 50 U.S.C. § 663, 64 Stat. 132 (formerly 10 U.S.C. § 1522, 41 Stat. 797, as amended 50 Stat. 724, 56 Stat. 732). Thus, there is no valid reason why the doctrines governing the reviewability by habeas corpus in federal

courts of judgments of state courts should be inapplicable to similar reviews of judgments of courts-martial.

The difference in degree of appellate review available to a person collaterally attacking a judgment of a state tribunal and to one similarly challenging a judgment of a military court is not substantial enough, as petitioners think (Pet. 22-23), to warrant the denial of the applicability of the general rule to judgments of courts-martial. The fact that a person in state custody has opportunity, which is unavailable to one in military custody, for review of his conviction by this Court prior to petitioning a federal District Court for a writ of habeas corpus, since the latter process is contingent upon exhaustion of the former, does not create any disparity in appellate opportunities tantamount to a denial of any fundamental rights. In fact, one applying for federal habeas corpus to review a judgment of a state court is not necessarily assured of an additional hearing on the merits, for if this Court denies him certiorari, the District Court will on that ground, as a rule, deny his petition for habeas corpus without a hearing, even though the fact of refusal of certiorari has not resolved any issues on the merits. Cf. *Darr* v. *Burford*, 339 U. S. 200, 215-216. As the court below pointed out (R. 30), "due process of law is not a fixed formula of unchanging and unchangeable elements. Due process of law in the armed forces has always been in some respects different from due process under civil authority. 'To those in the military or naval

services of the United States the military law is due process'," citing *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *French* v. *Weeks*, 259 U. S. 326, 335; *United States* v. *Hiatt*, 141 F. 2d 664, 666 (C. A. 3).

Nor is the danger of command influence upon courts-martial so great as to make military justice continually suspect of unfairness, as petitioners seem to imply (Pet. 22-23), and hence invariably subject to review by civil courts. If the military reviewing authority itself was so biased as to be constitutionally inadequate to redress, in accordance with due process, the wrongs complained of, it was incumbent upon petitioners so to allege in their petitions for habeas corpus, and to sustain the burden of proof in that respect. *Darr* v. *Burford*, 339 U. S. 200, 218; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1); *Scheckman* v. *Foster*, 172 F. 2d 339, 342 (C. A. 2), certiorari denied, 339 U. S. 924. This they have not done. They have not alleged any irregularities in the military appellate processes invoked by them.[6]

[6] Petitioners' claim (Pet. 23) that military appellate procedure did not measure up to civil standards, because, upon a motion for new trial "to the Judge Advocate General, no hearing is held to permit a petitioner to prove his allegations, no counter-affidavits are submitted; the Judge Advocate General investigates the charges, satisfies himself as to the substance of the allegations, and there is no appeal from his decision", is not supported by the record. Throughout the appellate procedure, petitioners were represented by counsel who was heard on their behalf; they had submitted affidavits and other documents, containing the same allegations as the instruments filed with their habeas corpus petitions, to the Judge Advocate General, who not only previously had the same matters investigated by the Inspector General's Office, but had a special board of officers re-examine the same matters after hearing petitioners' counsel, before denying their requests for a new trial.

We submit that applying the doctrine that a federal court, in the absence of "exceptional circumstances of peculiar urgency," will not relitigate, in a habeas corpus proceeding, matters adjudicated, in accordance with due process, in a non-federal tribunal, the courts below correctly held, without a hearing, that on the pleadings, which contained the detailed findings of the constitutionally authorized military reviewing authorities, there were no grounds upon which the requested relief could be granted. The documents submitted by respondents disproved all of petitioners' allegations.

Actually, as shown hereafter, the allegations of the petitions for habeas corpus, when considered in the light of the specific facts offered in support thereof, do not raise issues which would afford a basis for collateral attack even on a judgment of conviction of a federal court.

1. The admissibility of the confession was an issue thoroughly explored at the trial and on review. As the court below pointed out (R. 36), "Upon the face of the papers presented by the petitioner the issue was, in the light most favorable to him, clearly debatable, and there was substantial evidence in support of the conclusion" against his allegations. An objection to the admissibility of evidence, even on constitutional grounds, does not support a collateral attack on criminal judgments by either habeas corpus or a motion under 28 U. S. C. 2255. *Smith* v. *United States*, 187 F. 2d 192, 197 (C. A. D. C.), certiorari denied, 341 U. S.

927; *Burall* v. *Johnston*, 134 F. 2d 614 (C. A. 9), certiorari denied, 319 U. S. 768.[7]

2. The allegations of denial of the right to counsel are so clearly contradicted by the admitted facts as not to raise an issue which would require a hearing. Cf. *Close* v. *United States*, 198 F. 2d 144 (C.A. 4), No. 130 Misc., O. T. 1952, certiorari denied, November 13, 1952. The record clearly shows that the Commanding General did not abuse his discretion in declaring Colonel Daly "not available" as defense counsel (see pp. 9-10, *supra*). Petitioners themselves stated at the trial that they were "satisfied" with their counsel. Burns cannot complain of his deliberately selected counsel, nor can such counsel be said to have had insufficient time to prepare a defense in view of the fact that he did not request an adjournment and in view of the fact that assistant defense counsel were thoroughly familiar with the case. Cf. *Morton* v. *Welch*, 162 F. 2d 840 (C. A. 4); *Setser* v. *Welch*, 159 F. 2d 703 (C. A. 4), certiorari denied, 331 U. S. 840.

3. With respect to petitioners' allegations that important evidence was suppressed by the prosecution, the court below pointed out that Colonel Daly, who has submitted an affidavit in support of petitioners' allegations, although appear-

[7] The failure, if any, to advise Dennis of his constitutional privilege against self-incrimination, did not render the hair inadmissible in evidence. *Powers* v. *United States*, 223 U.S. 303, 314; *Wilson* v. *United States*, 162 U.S. 613, 623; *United States* v. *Freeman*, 167 F. 2d 786, 790-791 (C.A. 7), certiorari denied, 335 U.S. 817; *United States* v. *Klinger*, 136 F. 2d 677, 678 (C.A. 2), certiorari denied, 320 U.S. 746.

ing as a witness at their trials "made no mention of the dog-tags or the Navy uniform." Furthermore, his "affidavit does not show that the prosecutors knew of such items or that Colonel Daly ever called them to the attention of counsel either for the prosecution or for the defense." (R. 38.) Thus, side from the fact that, on petitioners' motion for a new trial, the Judge Advocate General, after an exhaustive independent investigation, found the charges "baseless," petitioners allege no such misconduct by the prosecution as would bring the cause within the scope of *Mooney* v. *Holohan*, 294 U. S. 103.[8]

4. The retraction by Calvin Dennis would not be a sufficient basis for a new trial in a criminal case, much less a basis for collateral attack. *Wild* v. *Oklahoma*, 187 F. 2d 409 (C. A. 10); cf. *Valdez* v. *United States*, 244 U. S. 432; *Cobb* v. *Hunter*, 167 F. 2d 888, (C. A. 10), certiorari denied, 335 U. S. 832. The record shows that Burns had vigorously attacked the credibility of Calvin Dennis at the trial, so that the present effort is merely an attempt to relitigate decided issues.

5. Petitioners allege no facts to support their contention "that the atmosphere surrounding the trial was one of hysteria and terror" (R. 13). As the court below found "every relevant fact is to the contrary" (R. 40).

---

[8] The allegations as to attempted subornation of perjury by the prosecuting investigators, if true, could not in any way have injured petitioners since no evidence alleged by them to be perjured was used against them. See *United States* v. *Dennis*, 4 CMR (AF) 872, 906. Their allegations that specimens of Dennis' hair was "planted" as evidence against him, are unsupported.

Petitioners were given full opportunity to, and did, tender before the military appellate authorities exactly the same issues raised in their habeas corpus petitions. *United States* v. *Dennis*, 4 CMR (AF) 872, 888, 904-907; *United States* v. *Burns*; 4 CMR (AF) 907, 923, 927-930. Petitioners do not claim that the appellate authorities failed fully and fairly to consider all of their evidence relative to the constitutional issues, or in any way denied them due process in the course of their appeals. Petitioners have been accorded their full measure of constitutional rights and cannot relitigate on collateral attack issues fairly decided against them on the basis of substantial evidence. *Whelchel* v. *McDonald*, 340 U. S. 122; *Darr* v. *Burford*, 339 U. S. 200; *Ex parte Hawk*, 321 U. S. 114; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Frank* v. *Mangum*, 237 U. S. 309; *Schechtman* v. *Foster*, 172 F. 2d 339 (C. A. 2), certiorari denied, 339 U. S. 924.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

DECEMBER 1952.

APPENDIX

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> Art. 47 [10 U.S.C., Supp. II, 1518(c)].
> *Action on record of trial.*
>
> Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.
>
> Art. 48 [10 U.S.C., Supp. II, 1519].
> *Confirmation.*
>
> In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:
>
> a. By the President with respect to any sentence—(1) of death, * * *

Art. 49 [10 U.S.C., Supp. II, 1520].
Powers incident to power to confirm.

The power to confirm the sentence of a court-martial shall be held to include—

a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense:

b. The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

d. The power to order the sentence to be carried into execution;

e. The power to remand the case for a rehearing under the provisions of article 52.

Art. 50 [10 U.S.C., Supp. II, 1521].

(a) *Action by Board of Review when approval by President or confirming action is required.*

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit

its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

* * * * *

(h) *Finality of court-martial judgments.*

The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as re-

quired by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

Art. 53 [10 U.S.C., Supp. II, 1525].
Petition for new trial.

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all pro-

ceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Art. 92 [10 USC., Supp. II, 1564].
Murder; rape.

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided,* That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952 232647 780

LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
FEB 4 1953
HAROLD B. WILLEY, Clerk

No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE, THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE, GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
I. The allegations of the habeas corpus petitions	3
II. The proceedings before the military tribunals	6
A. The proceedings at the courts-martial	6
B. Review by the Staff Judge Advocate and the Board of Review	18
C. Review by the Judicial Council and The Judge Advocate General	21
D. Review on petitions to The Judge Advocate General for new trials	23
III. The judicial proceedings	28
Summary of argument	29
Argument:	
I. The petitions for habeas corpus, when considered with both the facts alleged in support and the military record, raise no issue of jurisdiction, which alone is within the competence of civil courts to review	38
A. Review of courts-martial by civil courts is strictly limited to issues of jurisdiction	38
B. Under the Constitution, the regulation of courts-martial is a matter for Congress and not for the courts	49
C. The petitions for habeas corpus raise no jurisdictional issue	57
1. Confessions	59
2. Detention	61
3. Counsel	61
4. Alleged atmosphere of terror	62
5. Alleged suppressed evidence and subornation of perjury	63
II. The Court of Appeals correctly held that, in view of the fact that all issues raised by the petitions for habeas corpus had been considered and passed upon by the military authorities, the district court properly denied the petitions without a hearing on the basis of the military record	67
Conclusion	83
Appendix A	84
Appendix B	89
Appendix C	110

CITATIONS

Cases: Page

Ahrens v. *Clark*, 335 U. S. 188 3
Altmayer v. *Sanford*, 148 F. 2d 161 80
Anthony v. *Hunter*, 71 F. Supp. 823 43
Benjamin v. *Hunter*, 169 F. 2d 512 42
Bishop v. *United States*, 197 U. S. 334 ..... 39, 46, 62
Boone v. *Nelson*, 72 F. Supp. 807 43
Buvall v. *Johnston*, 134 F. 2d 614, certiorari denied, 319 U. S. 768 60
Carignan v. *United States*, 342 U. S. 36 78
Carter v. *McLaughry*, 183 U. S. 365 ..... 39, 45, 52
Carter v. *Roberts*, 177 U. S. 496 ..... 39, 45
Carter v. *Woodring*, 92 F. 2d 544, certiorari denied, 302 U. S. 752 ..... 41, 48, 63
Close v. *United States*, 198 F. 2d 144, No. 130 Misc., Oct. Term, 1952, certiorari denied, 344 U. S. 879 62
Cobb v. *Hunter*, 167 F. 2d 888, certiorari denied, 335 U. S. 832 66
Coggins v. *O'Brien*, 188 F. 2d 130 ..... 65, 69, 70, 75
Collins v. *McDonald*, 258 U. S. 416 ..... 30, 39, 40, 45, 60
Creary v. *Weeks*, 259 U. S. 336 ..... 39, 50
Darr v. *Burford*, 339 U. S. 200 ..... 37, 65, 70, 72, 75, 76
DeWar v. *Hunter*, 170 F. 2d 993, certiorari denied, 337 U. S. 908 ..... 42, 43
Dynes v. *Hoover*, 20 How. 65 ..... 39, 46, 48, 52
Frank v. *Mangum*, 237 U. S. 309 ..... 70, 76
French v. *Weeks*, 259 U. S. 326 ..... 39, 50, 72
Gallegos v. *Nebraska*, 342 U. S. 55 61
Gault v. *Burford*, 173 F. 2d 813 69
Givens v. *Zerbst*, 255 U. S. 11 39
Goodwin v. *Smyth*, 181 F. 2d 498 69
Grafton v. *United States*, 206 U. S. 333 39
Grimley, In re, 137 U. S. 147 ..... 38, 39, 47
Gusik v. *Schilder*, 340 U. S. 128 ..... 36, 40, 47, 48, 55, 68, 70, 75
Hawk, Ex parte, 321 U. S. 114 ..... 36, 68, 72, 76
Henry v. *Hodges*, 171 F. 2d 401, certiorari denied *sub nom.* *Henry* v. *Smith*, 336 U. S. 968 42
Henry v. *United States*, 12 F. 2d 670 66
Hiatt v. *Brown*, 339 U. S. 103 ..... 30, 40, 42, 43, 46, 62
Hiatt v. *Smith*, 170 F. 2d 61, reversed, 336 U. S. 695 80
Hicks v. *Hiatt*, 64 F. Supp. 238 ..... 43, 46
House v. *Mayo*, 324 U. S. 42 68
Humphrey v. *Smith*, 336 U. S. 695 ..... 30, 40, 42, 53
Johnson v. *Eisentrager*, 339 U. S. 763 3
Johnson v. *Sayre*, 158 U. S. 109 ..... 39, 44
Kahn v. *Anderson*, 255 U. S. 1 ..... 58, 62
Keyes v. *United States*, 109 U. S. 336 ..... 30, 39, 40, 48, 63
Kurtz v. *Moffitt*, 115 U. S. 487 39

Cases—Continued

	Page
Lyons v. *Oklahoma*, 322 U. S. 596	61
McClaughry v. *Deming*, 186 U. S. 49	39
McNabb v. *United States*, 318 U. S. 332	33, 61, 78
Martin v. *Mott*, 12 Wheat. 19	39, 62, 74
Martin v. *United States*, 154 F. 2d 269	66
Mason, Ex parte, 105 U. S. 696	39
Miller v. *Hiatt*, 141 F. 2d 690	61
Milligan, Ex parte, 4 Wall. 2	50, 53
Montalvo v. *Hiatt*, 174 F. 2d 645, certiorari denied, 338 U. S. 874	45
Mooney v. *Holohan*, 294 U. S. 103	64, 69
Moore v. *Dempsey*, 261 U. S. 86	62, 69, 70
Moran, Matter of, 203 U. S. 96	60
Morton v. *Welch*, 162 F. 2d 840	81
Mullan v. *United States*, 140 U. S. 240	39, 48, 62
Mullan v. *United States*, 212 U. S. 516	39
Powers v. *United States*, 223 U. S. 303	60
Quirin, Ex parte, 317 U. S. 1	40, 50, 53, 74
Reaves v. *Ainsworth*, 219 U. S. 296	32, 50, 56, 72
Reed, Ex parte, 100 U. S. 13	30, 39
Reilly v. *Pescor*, 156 F. 2d 632, certiorari denied, 329 U. S. 790	42, 74
Richardson v. *Zuppann*, 81 F. Supp. 809, affirmed, 174 F. 2d 829	61, 78
Romero v. *Squier*, 133 F. 2d 528, certiorari denied, 318 U. S. 785	60
Runkle v. *United States*, 122 U. S. 543	39, 46
Schechtman v. *Foster*, 172 F. 2d 339, certiorari denied, 339 U. S. 924	65, 69, 76, 77
Schita v. *King*, 133 F. 2d 283, certiorari denied, 322 U. S. 761	41, 43
Setser v. *Welch*, 159 F. 2d 703, certiorari denied, 331 U. S. 840	81
Slappey v. *United States*, 110 F. 2d 528	66
Smith v. *United States*, 187 F. 2d 192, certiorari denied, 341 U. S. 927	60, 61
Smith v. *Whitney*, 116 U. S. 167	39, 52
Sunal v. *Large*, 332 U. S. 174	65
Swaim v. *United States*, 165 U. S. 553	30, 39, 40, 45, 52, 60, 62, 63
Tucker, Ex parte, 212 Fed. 569	41
United States v. *Bayer*, 331 U. S. 532	78
United States v. *Burns*, 4 CMR (AF) 907	76
United States v. *Cordo*, 186 F. 2d 144, certiorari denied, *sub nom. Minkoff* v. *United States*, 340 U. S. 952	66
United States v. *Dennis*, 4 CMR (AF) 872	76
United States v. *Dennis*, 4 CMR (AF) 930	15
United States v. *Fletcher*, 148 U. S. 84	37, 39, 46, 74

Cases—Continued

	Page
United States v. *Freeman*, 167 F. 2d 786, certiorari denied, 335 U. S. 817	60
United States v. *Hiatt*, 141 F. 2d 664	72
United States v. *Klinger*, 136 F. 2d 677, certiorari denied, 320 U. S. 746	60
United States ex rel. Kennedy v. *Tyler*, 269 U. S. 13	68, 76
United States ex rel. McClellan v. *Humphrey*, 181 F. 2d 757	47
United States v. *Mitchell*, 322 U. S. 65	78
United States ex rel. Smith v. *Baldi*, 192 F. 2d 540, certiorari granted, 343 U. S. 903	69
United States ex rel. Weintraub v. *Swenson*, 165 F. 2d 756	43
Valdez v. *United States*, 244 U. S. 432	66
Vallandigham, Ex parte, 1 Wall. 243	50
Vidal, In re, 179 U. S. 126	32, 50
Wade v. *Hunter*, 336 U. S. 684	40, 42
Waite v. *Overlade*, 164 F. 2d 722, certiorari denied, 334 U. S. 812	43
Wales v. *Whitney*, 114 U. S. 564	39
Walker v. *Johnston*, 312 U. S. 275	59
Watkins, Ex parte, 3 Pet. 193	39
Whelchel v. *McDonald*, 340 U. S. 122	30, 33, 40, 47, 51, 60, 63, 74, 76
Wild v. *Oklahoma*, 187 F. 2d 409	66
Wilson v. *United States*, 162 U. S. 613	60
Wise v. *Withers*, 3 Cranch 331	39
Yamashita, In re, 327 U. S. 1	40
Constitution and Statutes:	
Constitution, Art. I	32
Articles of War before 1948 revision;	
AW 8 (10 U. S. C., 1946 ed., 1479)	58
AW 11 (10 U. S. C., 1946 ed., 1482)	53
AW 17 (10 U. S. C., 1946 ed., 1488)	13, 20, 53
AW 40 (10 U. S. C., 1946 ed., 1511)	54
AW 50½ (10 U. S. C., 1946 ed., 1522)	54
AW 70 (10 U. S. C., 1946 ed., 1542)	53
AW 92 (10 U. S. C., 1946 ed., 1564)	58, 87
Articles of War, 1948 Revision, 62 Stat. 639:	
AW 4 (10 U. S. C. (Supp. II) 1475)	54
AW 8 (10 U. S. C. (Supp. II) 1479)	54
AW 11 (10 U. S. C. (Supp. II) 1482)	55
AW 46 (10 U. S. C. (Supp. II) 1517)	78
AW 47 (10 U. S. C. (Supp. II) 1518)	84
AW 48 (10 U. S. C. (Supp. II) 1519)	84
AW 49 (10 U. S. C. (Supp. II) 1520)	84
AW 50 (10 U. S. C. (Supp. II) 1521)	55, 57, 85
AW 53 (10 U. S. C. (Supp. II) 1525)	36, 57, 67, 73, 86
AW 88 (10 U. S. C. (Supp. II) 1560)	55

Constitution and Statutes—Continued — Page

Act of May 5, 1950, sec. 12, 64 Stat. 147 (50 U. S. C. (Supp. V) 740 — 73
Civil Regulations with the Force and Effect of Law in Guam (Codes of Guam, U. S. Govt. Printing Office, 1947), Chapter 35 — 79, 88
Guam Penal Code — 79
Joint Resolution of July 25, 1947, Chapter 327, Section 3, 61 Stat. 451 — 58
Uniform Code of Military Justice 64 Stat. 107:
Art. 26 (50 U. S. C. (Supp. V) 590) — 56
Art. 27 (50 U. S. C. (Supp. V) 591) — 56
Art. 67 (50 U. S. C. (Supp. V) 654) — 56
Art. 73 (50 U. S. C. (Supp. V) 660) — 73
Art. 74 (50 U. S. C. (Supp. V) 661) — 73
Art. 76 (50 U. S. C. (Supp. V) 663) — 57, 71
28 U. S. C. 2255 — 51, 61

Miscellaneous:
Ansell, *Some Reforms in Our System of Military Justice* (1922), 32 Yale Law Journal 146 — 53
Executive Order No. 10026, effective Feb. 1, 1949 (1949 Manual for Courts Martial, U. S. Air Force) — 54
Executive Order 10214, dated February 8, 1951, a new Manual for Courts-Martial effective May 31, 1951 — 56
H. Rep. 2722, 79th Cong., 2d Sess — 54
H. Rep. 1034, 80th Cong., 1st Sess — 54
Holtzoff, *Administration of Justice in the United States Army* (1947), 22 N. Y. U. L. Q. Rev. 1 — 54
Manual for Courts-Martial, U. S. Air Force, 1949 — 54, 79
Manual for Courts-Martial, 1951 — 56
Morgan, *The Existing Court-Martial System and the Ansell Army Articles* (1919), 29 Yale L. J. 52 — 53
Note, *The Preliminary Investigation in the Army Court-Martial System—Springboard for Attack by Habeas Corpus* (1949), 18 Geo. Wash. L. Rev. 67 ff — 42
Pasley, *The Federal Courts Look at the Court-Martial* (1950) 12 Univ. of Pitt. L. Rev. 7, 25–34 — 41
Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War* (1921), 12 J. Crim. L. and Criminology 84 — 53
Wallstein, *The Revision of the Army Court-Martial System* (1948), 48 Col. L. Rev. 219 — 55–56
Winship, *Court-Martial Procedure Compared with Criminal Procedure in Civil Courts* (1932), 1 Fed. Bar. J. No. 2, 3, 9–14 — 74–75
Wurfel, *Military Habeas Corpus:* II, (1951) 49 Mich. L. Rev. 699 — 74

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 422

ROBERT W. BURNS AND HERMAN P. DENNIS, JR., PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE, THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE, GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinions of the District Court are reported at 104 F. Supp. 310 and 312 (R. 18–20). The majority and dissenting opinions of the Court of Appeals (R. 21–44, 44–56) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and amended on

August 25, 1952 (R. 58). The petition for a writ of certiorari was filed on October 29, 1952, and was granted on December 15, 1952. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a review of courts-martial judgments by civil courts in habeas corpus proceedings is limited to an inquiry as to whether the courts-martial had jurisdiction in the traditional sense, and whether the habeas corpus petitions in this case raise such jurisdictional issues.

2. If the civil courts have competence to inquire generally whether due process has been accorded in the court-martial proceedings, whether, on petitions for habeas corpus alleging violations of due process in court-martial proceedings, petitioners were entitled to a hearing on factual issues which had been examined and found groundless in the military appellate processes.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 83–87.

STATEMENT

Petitioners Burns and Dennis, Staff Sergeant and Private in the United States Air Force, stationed in Guam, were separately tried in May 1949 by courts-martial in Guam and convicted of the murder and rape of Ruth Farnsworth, in violation of the 92nd Article of War. Each was

found guilty of the offenses charged and sentenced to death (R. 1, 7, 9, 16, 18). After exhausting the processes of military review, set forth in detail below (*infra,* pp. 18–28), during which their sentences were confirmed by the President, they filed the instant petitions for writs of habeas corpus in the United States District Court for the District of Columbia. The respondents are the officials under whose authority petitioners are in custody in Japan, awaiting execution (R. 1–5, 9–15).[1] The District Court denied the petitions without hearing witnesses (R. 20), and the Court of Appeals affirmed, with one dissent (R. 57).

I

THE ALLEGATIONS OF THE HABEAS CORPUS PETITIONS

Petitioners contend that their detention is unlawful because the courts-martial, having denied them due process as a result of certain alleged irregularities in the conduct of their trials, had lost jurisdiction over them. The irregularities alleged in the habeas corpus petitions are as follows:[2]

1. *Unlawful detention.*—That on January 7, 1949, after being surrendered by military au-

---

[1] Petitioners, although outside the territorial jurisdiction of any federal court, seem to have "standing to invoke the process of federal courts somewhere." *Johnson* v. *Eisentrager*, 339 U. S. 763, 790; compare *Ahrens* v. *Clark*, 335 U. S. 188.

[2] Attached to the petitions are affidavits by petitioners, their accomplice Calvin Dennis, and certain other persons.

thorities, petitioners were arrested and placed in custody of civil authorities on Guam,[3] where, without arraignment, they were held incommunicado in solitary confinement, not allowed to consult with counsel, "subjected to continuous questioning, beaten, denied sleep and edible food," in violation of the Penal Code of Guam and the United States Constitution, until their return to the custody of the Air Force several weeks later (R. 2–3, 10–11, 13). During his detention; Herman Dennis, "without being advised of his constitutional rights against self-incrimination had taken from his person certain public hairs which were subsequently used as evidence against him" (R. 12).

2. *Coerced confessions.*—That, as a "result of physical duress, protracted interrogation, the use of a lie detector, threats" that he would receive the death sentence if he did not confess and promises of leniency if he did, and "various subterfuges", and without being adequately advised of his rights against self-incrimination, Herman Dennis gave four confessions, which also implicated Burns (R. 11, 12, 13).

3. *Denial of counsel of petitioners' choice, or effective assistance of counsel.*—That counsel se-

[3] The United States Navy furnished and supervised the government of Guam, and the Guam officials involved in these cases were Navy or Marine officers or civilians employed by the Navy.

lected by Burns "had only one day to prepare his defense, thereby depriving petitioner of his right to effective counsel" (R. 4); that Dennis was denied a "request for counsel of his choice," the counsel furnished him "did not take adequate time to prepare" his defense (R. 12), and he had no opportunity for advice until "shortly" before his trial (R. 11).

4. *Suppression of evidence and perjured testimony.*—That certain "important evidence tending to show" petitioners' innocence was suppressed by the prosecution (R. 4, 12); that Calvin Dennis, charged with the same offenses, whose testimony alone directly connected Burns with the crimes charged, admitted in a sworn statement that his testimony was perjured as a result of "threats and promises of special consideration if Calvin Dennis agreed to testify against" Burns (R. 4, 3);[4] that the prosecution "sought to procure witnesses to perjure themselves" against petitioner Herman Dennis, "and intimidated and threatened those who sought to help" him (R. 12); that specimens of hair attributed to Herman Dennis "were deliberately planted in an effort to create evidence tending to show his guilt" (R. 13).

---

[4] Burns also alleges that the "fruits" of the alleged coerced confessions of Herman Dennis were used against him (though these confessions were not themselves introduced at Burns' trial and Herman Dennis did not testify at Burns' trial); that "continued pressure and intimidation were used

5. *Trial in an atmosphere of terror.*—That their trials were "conducted in an atmosphere of terror, hysteria and vengeance" (R. 4, 12–13).[5]

II

THE PROCEEDINGS BEFORE THE MILITARY TRIBUNALS

Rules to show cause issued in each case, and respondents filed motions to dismiss, annexing the records of the courts-martial and the opinions and findings made by the Air Force authorities during the military appellate processes (R. 5–8, 15–18). From these exhibits, the following appears:

A. THE PROCEEDINGS AT THE COURTS-MARTIAL

Petitioner Herman Dennis was tried first, at a court-martial lasting from May 9, 1949, to May 16. Burns' trial commenced on May 27, 1949, and concluded on May 30. Both courts were composed of officers not stationed in Guam (mainly from Japan), and a wholly separate panel sat on Burns' court (TR (D) 2; TR (B) 2).

At both trials, the prosecution showed that on December 11, 1948, Ruth Farnsworth, a civilian Government employee, disappeared, under mys-

---

to get him [Burns] to confess" (R. 3); and that, failing this, threats and promises were used to get Herman Dennis and Calvin Dennis to testify against him (R. 3).

[5] Dennis also alleges that certain "prejudicial statements were introduced into the record that were irrelevant, immaterial, inflammatory and calculated to prejudice petitioner's cause" (R. 12).

terious circumstances, from the Jade Shop, a privately-owned, general-merchandise store on Guam in which she worked on a part-time basis (TR (D) 21–29, 83, 127; TR (B) 14–17, 27).[6] On the morning of December 13, 1948, she was found lying unconscious, though gasping for breath, in a small clearing in the jungle, a short distance behind the Jade Shop (TR (D) 36–37, 42–43; TR (B) 31–33, 37–38). Her face and neck were abraded, bruised, dirty, and bloody (TR (D) 38, 42–43; TR (B) 33, 38). She was unclothed below her waist and her thighs were scratched (*id.*). She died on the morning of December 14, 1948 (TR (D) 47; TR (B) 45–46). An examination of her body revealed that she was brutally beaten about the head and body, choked and raped (TR (D) 51–56; TR (B) 48–51).

1. *The proceedings of Dennis' trial*

a. ***Evidence connecting Dennis with the crime.***—In addition to the evidence relating to the disappearance and death of Miss Farnsworth, *supra,* pp, 6–7, the prosecution showed that Herman Dennis and Sergeant Burns were seen

[6] The symbol TR (B) refers to the typewritten copy of petitioner Burns' trial minutes and the symbol TR (D) to that of petitioner Dennis, both of which have been filed with the Court. The respondents' Exhibits cited herein were attached to the respondents' return to the rules to show cause, and have also been filed with the Court.

loitering around the Jade Shop on the evening of December 11, 1948, prior to Miss Farnsworth's disappearance (TR (D) 86–89). About 10 p. m. that night, Herman Dennis was given a ride to his base by a civilian driver of a weapons carrier at a point on the highway about three quarters of a mile from the Jade Shop (TR (D) 97–102). Laboratory analysis showed that certain head and pubic hairs found in the Army truck used by Calvin Dennis on the night of December 11th and the blankets found therein, as well as the head hairs found on one of Herman Dennis' shirts, were similar in all characteristics to the hair of Ruth Farnsworth, while the other pubic hairs found in the same truck and blankets were identical in their characteristics with hairs taken from Herman Dennis (TR (D) 153–155, 155–162, 163–166, 173–181, 182).[7]

b. *Dennis' confessions.*—There were also admitted in evidence four statements by Herman Dennis (TR (D) 275; Pros. Exs. 40–43), in which he admitted that on December 11, 1948, between 6 and 8 p. m., together with Burns and Calvin Dennis, he arrived at the Jade Shop in a truck driven by Calvin, that they entered the shop, that Burns struck and knocked Miss Farnsworth

[7] Similarly, Miss Farnsworth's smock which was found in the truck contained two types of pubic hairs identical in all characteristics and color to those of the victim and Herman Dennis, respectively (TR (D) 165–168, 168–171, 171–172, 184–186).

to the floor, that he (Herman Dennis) put out the lights and helped carry the victim to the truck in which she was taken to a clearing in the jungle behind the shop, and that he committed three acts of sexual intercourse with the unconscious victim. He then left the scene and "thumbed a ride" back to his base in a weapons carrier.

Before being admitted, these statements were subject to an inquiry by the court as to their voluntariness, and the following facts were adduced by the prosecution:—On January 7, 1949, Herman Dennis, together with other airmen, was asked to volunteer for a "lie detector" test, which was being administered by a civilian criminologist under the supervision of the Assistant Chief of Guam naval police (TR (D) 187–188, 207–209, 217). After the mechanics of the test were explained to him and he was advised of his right to refuse to submit thereto and to remain silent, he voluntarily consented, in writing, to submit to such test (TR (D) 187–188, 194, 195, 208, 217, 224). At the conclusion of the test, he was told that "his test was not what it should be," and he was placed under arrest by the naval police authorities. Instructions were given that he would not be permitted to communicate with anyone other than the two investigators conducting the test. (TR (D) 221, 225, 226, 193–194, 209, 214, 331–332.) Later that day and again on January 8

and 10, he was interrogated briefly concerning the crime, but he made no incriminating statements (TR (D) 189–191, 199, 209, 218–219).[8]

On the evening of January 11, 1949, after being warned of his rights against self-incrimination, he was interrogated by a civilian criminologist and the assistant chief of naval police, both of whom told him that Calvin Dennis had confessed, implicating him (TR (D) 189–191, 196–197, 198, 199, 204–205, 210, 219, 163). After Calvin, who was brought into his presence, admitted making a confession, Herman Dennis was left alone with pad and pencils (TR (D) 189, 209, 210, 261). Later that evening, Herman Dennis handed the assistant police chief two statements in his handwriting, only one of which was signed, admitting his part in the rape of Miss Farnsworth (TR (D) 192, 210–212, 275, 285).

On the morning of January 12, 1949, Herman Dennis, with his consent, was taken to the office of the chief of police, where, after being warned of his constitutional rights, he signed a typewritten statement in question and answer form, in which he enlarged upon his original confession (TR (D) 192–194, 212–213, 214, 215, 227, 230–231, 261). After making this statement, he proceeded to reenact his part in the crime, but, in the course of tracing the route of the crime, he refused to

[8] On January 8, 1949, at the request of the investigators, Herman Dennis extracted from his body some pubic hairs for use in laboratory analysis and comparison with hairs found on his shirt and in blankets found in the army vehicle commonly used by Calvin Dennis (TR (D) 155–162).

complete it, stating "Please, I don't want to go any further" (TR (D) 278–283, 284–285, 34–36). The following morning, again after being warned of his rights, he signed another typewritten statement in question and answer form, which further amplified his original confession (TR (D) 213–214, 216, 275, 285). Several days later he was civilly arraigned (TR (D) 227) and on January 29, 1949, was transferred for confinement by military authorities (TR (D) 331).

Petitioner Dennis testified, on the inquiry into the admissibility of the confessions, that, following his arrest, he had been allowed no visitors except a Chaplain, that he had been subjected to protracted interrogations, received no warning of his rights, was promised leniency if he confessed and death by hanging, dramatized by a display of photographs of a victim of a hanging, if he did not.[9] He did not, however, claim that he had been beaten, but expressly said that he had not been (TR (D) 253); 4 CMR (AF) at 895–896).

After hearing the testimony, the court-martial received the four statements in evidence with

[9] There was also some defense testimony that at a social gathering in March, 1949, the assistant police chief, in response to an inquiry from Lieutenant Colonel Daly as to how he obtained the confessions, replied, "Oh, you know how we do it. We kind of give them the business or rough them up" (TR (D) 238, 236–238). On cross-examination it was shown that the question was asked and the answer given in a "joking," or "jovial manner" (TR (D) 237, 238).

instructions that their admission in evidence was not conclusive as to their voluntary nature and that they were not to be considered by any member of the court on the question of guilt unless he found the confessions to have been voluntary (TR (D) 187–233, 233–235, 239–253, 254–260, 260–264, 275, 285; Pros. Exs. 40–43; Def. Exs. A, B, TR (D) 242).

c. *Assistance of counsel.*—At the opening of the trial, on May 9, 1949, Dennis stated: "I desire the regularly appointed defense counsel but do wish to have Lieutenant Colonel Edward F. Daly to assist" (TR (D) 3). The law member of the court ruled that, since the Department of the Air Force at Washington concurred in the Commanding General's determination that Lieutenant Colonel Daly was not available as Herman Dennis' defense counsel, such determination was controlling (TR (D) 4).

In connection with this ruling, the following facts were shown:—On February 1, 1949, Dennis was charged with a violation of the 92nd Article of War (*infra,* p. 87), in two specifications. On February 4, 1949, he indicated to the pre-trial investigating officer that he did not particularly desire any civilian defense counsel, but that he did desire Lieutenant Colonel Tolen for his counsel (TR (D) App. 2). On April 8, 1949, Lieutenant Colonel Tolen was formally appointed as defense counsel, to be assisted by Captain Katz and First Lieutenant Ensley, all of whom, on

March 21, 1949, had been similarly assigned as counsel for Burns (TR (D) 1, 9–9A; TR (B) 1). Lieutenant Colonel Tolen had represented Dennis throughout the six-week pre-trial investigation, and Captain Katz commenced his participation as one of Dennis' counsel a month before trial (TR (D) 10). After receiving the notification of appointment of counsel, Dennis requested, in writing, that Lieutenant Colonel Daly be appointed as special defense counsel "and that he be assisted by such of the regularly appointed defense counsel that he may desire" (TR (D) App. 3, p. 1). On April 12, 1949, after the Commanding General had ruled that Lieutenant Colonel Daly was "not available" under Article of War 17 (10 U. S. C., 1946 ed., 1488), Dennis stated in writing that he "still" desired him for his counsel (*id.* at p. 2). On April 13, 1949, Lieutenant Colonel Daly sent Dennis a letter, stating, "that in view of the fact that I actively participated in the investigation of the case and was responsible for the production of much of the evidence in connection therewith, and may be called to testify for the prosecution * * * I can not conscientiously defend you and do not desire to defend you or any of the other accused in connection with the crime" (TR (D) App. 4).

On April 15, 1949, the Commanding General wrote Herman Dennis that since the latter had originally selected Lieutenant Colonel Tolen for his counsel, "Colonel Daly was free to be assigned

an active part in the preparation of the government's case," and that consequently he was "not available" as defense counsel (TR (D) App. 6). The following day Herman Dennis replied that despite Lieutenant Colonel Daly's "connection with the case," he "still" desired "him to represent me if I can have him" (TR (D) App. 5). On April 16, the Commanding General "reluctantly" declared Lieutenant Colonel Daly available to act as Dennis' "individual defense counsel to be assisted by the appointed defense counsel" (TR (D) App. 7).

On April 18, 1949, the Commanding General reversed his own decision and notified Dennis that Lieutenant Colonel Daly would "not be available," because he was "under psychiatric examination pending his own arraignment under charges of numerous alleged acts of misconduct" (*id.*). This ruling was confirmed by the Department of the Air Force in Washington. On April 19, 1949, Dennis sent a letter to the Commanding General, stating, that "In view of the contents of your letter of 18 April 1949, I do not desire the services of Lt. Colonel Edward F. Daly and I will accept the regularly appointed defense counsel" (TR (D) App. 8). The appointed defense counsel did not know until the day the trial began (May 9) that Dennis still desired Lt. Col. Daly as one of his defense counsel (TR (D) 4).

d. *Dennis' defense.*—Dennis testified in his own behalf. His testimony was to the effect that from

about 7:45 p. m. until 9:30 p. m. on December 11, 1948, he attended a movie at his base, after which he stopped at the enlisted men's club, before retiring to his barracks around 11 p. m. (TR (D) 311). Several other airmen testified, more or less firmly, that they had seen him at the movie or going into or leaving it, and there was some other evidence intended to discredit some of the prosecution testimony (TR (D) 287–310).

2. The proceedings at Burns' trial

a. ***Evidence of Burns' connection with the crime.***—At the trial of Burns, the prosecution, after adducing evidence on the disappearance and death of Miss Farnsworth, *supra*, pp. 6–7,[10] presented Private Calvin Dennis,[11] one of the accomplices named in the charge against Burns, who, after being warned of his constitutional rights against self-incrimination and of his right to refuse to testify (TR (B) 53), testified as follows:

[10] The prosecution also adduced evidence showing that the various hairs taken from Calvin Dennis' truck and from the blankets and the smock found therein were identical in their characteristics with those of the hairs taken from Miss Farnsworth's body and from Herman Dennis (TR (B) 92, 99–104, 114, 116, 121, 122, 123–129, 131–133).

[11] Calvin Dennis had, at the time of the Burns trial, been convicted by another general court-martial on the same charges and sentenced to death (TR (B) 56). The sentence was later commuted to life imprisonment by the President. See *United States* v. *Dennis*, ACM 1894, Calvin Dennis, 4 CMR (AF) 930, 956. He has not brought a habeas corpus proceeding.

About 8 p. m., on December 11, 1948, Calvin Dennis, who had extra duty driving an army truck as a shuttle bus; transported his half-brother, Herman Dennis,[12] and Sergeant Burns to the Jade Shop, where the latter struck and knocked Ruth Farnsworth to the floor (TR (B) 53–54, 55, 58, 59, 62, 73). Herman Dennis and Burns then threw the girl into the truck, and as Calvin drove the truck around to the clearing in the jungle in back of the Jade Shop, Herman and Burns took her off the truck into the jungle (TR (B) 54, 64, 65). Calvin then returned to his organization, where, shortly after 9 o'clock that evening, Burns called and asked Calvin to pick him up near a place called the Rocker Club (TR (B) 54–55, 141–142). Later, when Calvin was driving Burns back, the latter told him that he had intercourse with Ruth Farnsworth once or twice that night (TR (B) 55). When Calvin asked Burns why he struck the girl, Burns warned him to keep quiet lest he "get what she got" (*id.*). Burns then pulled out a smock, which he said he had taken from Miss Farnsworth, and placed it behind the seat of Calvin's truck (TR (B) 55–56).

[12] Calvin Dennis has supplied affidavits, attached to the habeas corpus petitions, stating that he is not a half-brother of Herman Dennis, and is not related to him, but at the Burns trial he testified that he was "supposed" to be Herman's half-brother (TR (B) 58; Resp. Ex. (Burns) G, p. 11, Appendix C, *infra*, p. 125) and Herman Dennis's confession referred to Calvin as his half-brother (Resp. Ex. (Dennis) C, p. 13, 4 CMR (AF) at 881).

There was further testimony to the effect that about 9:45 p. m., on December 11, 1948, a soldier noticed what appeared to be blood stains on Burns' trousers, and when he asked about them, Burns stated that he received the stains "cutting meat" (TR (B) 142–145).[13] Another soldier testified that the following morning Burns told him that he had intercourse but that he "got it the wrong way" (TR (B) 150).

Burns did not testify in his own behalf (TR (B) 159–160). His witnesses gave testimony tending to show that Calvin Dennis was intoxicated in the early evening of December 11th (TR (B) 154–159).

b. *Assistance of counsel.*—Burns was arrested by the naval military government police on January 10, 1949, and held by them until January 31, 1949, when he was transferred to the military authorities for confinement (TR (B) 181). On February 1, 1949, a charge and specifications similar to those preferred against Herman Dennis were filed against Burns (TR (B) 8–9). On March 31, three defense counsel were formally appointed for him (TR (B) 1). At the beginning of his trial on May 27, Burns introduced Captain Martin S. Drucker, a member of the Judge Advocate

[13] Although Burns was a mess sergeant, his duties did not include meat cutting; and it was improbable that any meat was cut on the night of December 11, 1948, which was Saturday, since Sunday dinners consisted of chicken or turkey, prepared from frozen fowl, which did not bleed much during the cutting process (TR (B) 150).

General's Corps of the Army and a qualified lawyer, as his "individual counsel," and made a request, which was granted, to retain two of the three regularly appointed defense counsel "to act as associate counsel" (TR (B) 3). Burns then stated that he was "satisfied" with such counsel, (*id.*). Neither he nor counsel of his choice requested a continuance of his trial (*id.*).

B. REVIEW BY THE STAFF JUDGE ADVOCATE AND THE BOARD OF REVIEW.

Pursuant to Article of War 47 (10 U. S. C., Supp. II, 1518 (c), *infra,* p. 83), the Staff Judge Advocate reviewed the record of the proceedings of both Herman Dennis and Burns, in separate written reports, and recommended approval of the sentences. See Resp. Ex. A in each proceeding. After approval by the convening authority, the respective trial records were forwarded to The Judge Advocate General of the Air Force, in Washington, D. C., for appellate review pursuant to Article of War 48 (10 U. S. C., Supp. II, 1519, *infra,* p. 83) (Resp. Exs. (Dennis) A, B, 4 CMR (AF), 872; Resp. Exs. (Burns) A, B, 4 CMR (AF) 907).

On November 21, 1949, a three-member Board of Review, in the office of The Judge Advocate General, after a review of Dennis' court martial proceedings and with the help of a brief and oral argument by one of his present counsel, found in a comprehensive opinion that "no errors injuriously affecting the substantial rights of the

accused were committed during the trial" and approved it (Resp. Ex. (Dennis) C, 4 CMR (AF), 872, 887).[14] After a similar submission of a brief and oral argument on behalf of Burns by one of his present counsel, a Board of Review, consisting of three different members, affirmed his court-martial proceedings on March 14, 1950, likewise in a comprehensive opinion (Resp. Ex. (Burns) C).[15]

1. As to Dennis, the Board of Review found as follows:

a. The record did not show that Herman Dennis, while in custody of the Guam authorities, suffered undue hardships or privations or that there was "any calculated endeavor on the part of officials to secure a confession through the pressure of unrelenting questioning" (Resp. Ex. (Dennis) C, p. 19; 4 CMR (AF) 872, 885). Although Herman Dennis together with other soldiers had voluntarily submitted to a "lie-detector" test prior to his arrest, no confessions

[14] The opinion of this Board of Review is reported at ACM 1892, Dennis (BR), 4 CMR (AF) 872–888. This citation refers to volume 4 of the Court Martial Reports of the Judge Advocate General of the Air Force, hereinafter referred to as CMR (AF). Volume 4 of CMR (AF) also reports the opinions of the Judicial Council in both cases (*infra*, pp. 21–22) and The Judge Advocate General's Memoranda to the Secretary of the Air Force (*infra*, pp. 22–23). Reprints of these opinions and memoranda, as reported in 4 CMR (AF), have been lodged with the Clerk.

[15] The opinion of this Board of Review is reported at 4 CMR (AF) 907–923.

were made while he was undergoing such tests, nor were the results of the tests used in evidence (*id.*).

b. The counsel requested by Herman Dennis (Lt. Col. Daly) was "not available" under Article of War 17 (10 U. S. C., 1946 ed. 1488). The "official files of the Air Force available at Headquarters, USAF", showed "that at the time of trial the officer requested by the accused as individual defense counsel was himself under charges involving misconduct, moral turpitude, drunkenness and disorderliness and the corrupt endeavor to obstruct and impede military justice *in the instant case and others allied therewith* and the unethical offer to abandon and withdraw from the defense of this accused and others provided he would be granted immunity from punishment for alleged prior acts of his own misconduct" (Resp. Ex. (Dennis) C, p. 17; 4 CMR (AF) 872, 884 (emphasis in original). On the date of the trial (May 9), Daly's resignation from the service "was in the processes of military administration," since on April 19, 1949, he had tendered such resignation "for the good of the service, in lieu of trial by court-martial" on the various charges pending against him (*id.*).

"The record of trial reveals that" Dennis "was defended ably and vigorously by the regularly appointed defense counsel, all three of whom were qualified attorneys, admitted to the practice of law in their respective states and designated as

judge advocates by the Chief of Staff, United States Air Force", and that they participated in the case since their formal assignment (March 21, 1949) without knowledge that Dennis was willing to obtain Coloney Daly as special counsel after the original information to Dennis that Daly was unavailable for the requested assignment (Resp. Ex. (Dennis) C, pp. 15–18; 4 CMR (AF) 872, 882–884).[16]

2. As to Burns, the Board of Review found that the record indicated that he "was defended at the trial by counsel of his choice" (Resp. Ex. (Burns) C, p. 19; 4 CMR (AF) 907, 921–922); that "Calvin Dennis' testimony was consistent in every respect with the corroborative evidence" (Resp. Ex. (Burns) C, p. 11; 4 CMR (AF) 907, 916); and that the atmosphere on Guam was not such as to preclude a fair and impartial trial (Resp. Ex. (Burns) C, p. 22; 4 CMR (AF) 907, 922).[17]

C. REVIEW BY THE JUDICIAL COUNCIL AND THE JUDGE ADVOCATE GENERAL

The Judicial Council, in the Office of The Judge Advocate General, after the submission of separate briefs and oral arguments on behalf of each petitioner by one of their present counsel to the

[16] The other alleged irregularities, now urged in the habeas corpus petitions, were apparently not urged by petitioner's counsel before the Boards of Review but were urged subsequently before The Judge Advocate General on petition for new trial (see pp. 23–28, *infra*).

[17] See fn. 16, *supra*.

effect "that the conviction should not be permitted to stand because the record shows violation of" their "fundamental individual rights," approved all prior proceedings against Dennis and Burns on July 18, and August 18, 1950, respectively (Resp. Ex. (Dennis) D; 4 CMR (AF) 888–904; Resp. Ex. (Burns) D; 4 CMR (AF) 923–927). The two opinions were extensive, considering each of the points raised by the accuseds' counsel.

Subsequently, in view of a series of letters on behalf of petitioners, containing "allegations which if true would reflect adversely upon the fundamental fairness of" their trials, and because of the gravity of the sentences, The Judge Advocate General of the Air Force, in his "capacity as supervisor of the administration of military justice generally," "requested the Office of Special Investigations, Office of The Inspector General, to make a complete investigation of these matters" (Resp. Ex. (Dennis) E; 4 CMR (AF) 904–907; Resp. Ex. (Burns) E; 4 CMR (AF) 927–930). Later, in transmitting, pursuant to the provisions of AW 50 (d) (1) (*infra*, pp. 84–85), the records of the appellate review accorded petitioners to the Secretary of the Air Force, The Judge Advocate General reported that "the most comprehensive investigation of the Office of Special Investigations disclosed nothing which would warrant my recommending disapproval of

the sentence" of either petitioner (Resp. Ex. (Dennis) E, p. 4; 4 CMR (AF) 904, 906; Resp. Ex. (Burns) E, p. 4; 4 CMR (AF) 927, 929).[18] On August 3, 1951, the President of the United States confirmed petitioners' sentences and ordered their execution by the Commanding General, Far East Air Force (Resp. Ex. (Dennis) F; 4 CMR (AF) 907; Resp. Ex. (Burns) F; 4 CMR (AF) 930).

D. REVIEW ON PETITIONS TO THE JUDGE ADVOCATE GENERAL FOR NEW TRIALS

Thereafter, petitioners, pursuant to provisions of 50 U. S. C., Supp. V, 660 (formerly Article of War 53), filed with The Judge Advocate General their petitions for a new trial (R. 8, 17, 19, 2, 10; Resp. Ex. (Dennis) G, p. 4; Resp. Ex. (Burns) G, p. 4). These petitions urged all the points which are set forth in the present habeas corpus petitions. The Judge Advocate General appointed a new board of officers, which heard the arguments of petitioners' counsel, and considered all the evidence presented (Resp. Ex. (Dennis) G, Appendix B, *infra,* pp. 88–108; Resp. Ex. (Burns) G, Appendix C, *infra,* pp. 109–130). On January 28, 1952, The Judge Advocate General, after considering the memoranda of the board of officers and after re-examining petition-

[18] The reports of the independent investigation were also forwarded to the Secretary of the Air Force (4 CMR (AF) 929).

ers' entire trial records and the independent investigations conducted at his request, as against the allegations set forth in their petitions for a new trial, denied petitioners' request for a new trial. He made the following findings with respect to the grounds alleged in their petitions:[19]

1. *Unlawful detention.*—He concurred in the findings of the Judicial Council that at the time of their arrest petitioners were "not deprived of any right to a preliminary hearing before a committing magistrate or other like authority", because Guam at that time was under control of "a military government deriving its authority from the United States and administered by the Department of the Navy. * * * Chapter 35, 'Civil Regulations With the Force and Effect of Law in Guam' (United States Government Printing Office, 1947) provides for the detention of United States military personnel and with respect to such personnel, operates in lieu of Sections 825 and 847–849, Penal Code of Guam, which is applicable to other offenders" (Resp. Ex. (Dennis) G, p. 7, Appendix B, *infra*, pp. 99–100). It was pointed out that this objection had no application to Burns since he had made no confession (Resp. Ex. (Burns) G, p. 7, Appendix C, *infra*, pp. 119–120).

[19] For the Court's convenience, the opinions of The Judge Advocate General on the petitions for new trial are reprinted in Appendix B (Dennis), and Appendix C (Burns), *infra*, pp. 88–130.

2. *Coerced confessions.*—The four statements made by Herman Dennis while he was detained by the Guam authorities were received in evidence against him, only "after presentation to the court of much evidence with respect to the voluntary nature of these confessions, including petitioner's own sworn testimony as a witness in his own behalf, and his denial that physical force was used against him", together with testimony showing that he had been warned of his constitutional rights (Resp. Ex. (Dennis) G, p. 8, Appendix B, *infra,* pp. 100–101). The Judge Advocate General agreed with the court that all the confessions were wholly voluntary (Resp. Ex. (Dennis) G, p. 8, Appendix B, *infra,* p. 101).

3. *Denial of counsel of petitioners' choice, or effective assistance of counsel.*—The record showed that petitioners had "capable counsel" of their own choice, and that they were defended with "loyalty, ability, and skill" (Resp. Ex. (Dennis) G, p. 12, Appendix B, *infra,* pp. 106–107; Resp. Ex. (Burns) G, p. 12, Appendix C, *infra,* p. 128).

4. *Suppression of evidence.*—The Judge Advocate General, in rejecting as a ground for a new trial the contention "that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was with-

held from the court," stated that "this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless" (Resp. Ex. (Dennis) G, p. 12, Appendix B, *infra,* p. 107; Resp. Ex. (Burns) G, p. 13, Appendix C, *infra,* p. 128).

5. *Perjured testimony.*—In view of the trial record and circumstances surrounding the case, The Judge Advocate General found that he could not place any credence in Calvin Dennis' affidavits repudiating his testimony given against Burns at the latter's trial (Resp. Ex. (Burns) G, p. 8, Appendix C, *infra,* pp. 120–125). He agreed with the Judicial Council, which found that "the record discloses that the trial judge advocate and the law member used commendable care to assure that Private Calvin Dennis appeared as a witness voluntarily and that there was present no coercive influence which would cause him to tell other than the truth", and that their interrogation shows "conclusively that Private Calvin Dennis offered himself as a witness freely and voluntarily and that his testimony was given with a full and complete understanding of his rights, uninfluenced and uncolored by any threat or promise" (Resp. Ex. (Burns) D, p. 5, 4 CMR (AF) 907, 926; Resp. Ex. (Burns) G, p. 10, Appendix C, *infra,* pp. 123–124). During his repeated assertions that he was testifying voluntarily, Calvin Dennis "sustained himself through a searching

cross-examination" by the defense. (Resp. Ex. (Burns) G, p. 8, Appendix C, *infra,* p. 122).

Concerning the affidavits of Lieutenant Colonel Daly and Miss Mary Louise Hill, in which they alleged facts tending to support the theory of the involuntary nature of Calvin Dennis' confessions, The Judge Advocate General noted that the allegations contained therein "were made the subject of an exhaustive investigation by the Directorate of Special Investigations, Office of the Inspector General, United States Air Force, both from the standpoint of the charges made and the motives for making the charges", and after reviewing the results of this investigation he could "arrive at no different conclusion than that previously reached, that the charges are unfounded". (Resp. Ex. (Dennis) G, p. 9, Appendix B, *infra,* p. 102; Resp. Ex. (Burns) G, pp. 10–11, Appendix C, *infra,* p. 125).

6. *Trial in an atmosphere of terror.*—The Judge Advocate General approved the conclusions (Resp. Ex. (Burns) G, pp. 13–14, Appendix C, *infra,* p. 120) that Burns' record shows that the atmosphere on Guam was not such as to preclude a fair and impartial trial (Resp. Ex. (Burns) C, p. 22; 4 CMR (AF) 907, 922). "All members of the court were from organizations located at distant points from the Island of Guam" (*id.*). Burns' counsel cross-examined several of the members of the court to determine whether they

possessed any preconceived opinion as to Burns' guilt or innocence, and declined to challenge any member for cause (*id.*). As for Dennis' charge that he was prejudiced by the admission of testimony by a white woman on Guam that petitioner had stated to her his unhappiness at segregation on the island and his desire for her picture, The Judge Advocate General concluded that the "evidence was properly admitted as a circumstance tending to show petitioner's feeling toward women, and his previous desires for female companionship", and that the evidence was not introduced to prejudice the court-martial (Resp. Ex. (Dennis), G. p. 10, Appendix B, *infra*, p. 104).

III

THE JUDICIAL PROCEEDINGS

The District Court, without affording petitioners a hearing, dismissed the petitions for writs of habeas corpus, on the ground that they did "not state facts upon which the relief sought can be granted" (R. 20). On the basis of the materials summarized in Part II (*supra*, pp. 6–28), it ruled that "The record here shows that extensive consideration was given to each of the matters asserted in support of the relief sought in these proceedings, and the various military authorities who were charged with the responsibility of review determined such matters to be factually groundless" (R. 19–20).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the judgments of the District Court (R. 57–58). It stated that, in accordance with its "frequent practice in capital cases," it had examined "the whole" of petitioners' "long records," but concluded, "in agreement with the District Court, that the facts alleged in the petitions, viewed in the light of the return to the rule, do not supply grounds upon which the relief sought can be granted" (R. 43). The court's exhaustive opinion took up each of the allegations of irregularity or unfairness, including the affidavits presented in support of the charges, and concluded that none of the allegations went to the jurisdiction of the court-martial, even under an expanded concept of jurisdiction. Circuit Judge Bazelon dissented on the ground that a sufficient showing had been made by petitioners to call for a hearing in the District Court (R. 44–56).

SUMMARY OF ARGUMENT

I

A. Throughout the history of the United States, this Court has consistently and repeatedly held that the only function of the civil courts in reviewing a trial by court-martial is to determine whether the court-martial was acting within its jurisdiction. Decisions have limited collateral inquiry to whether the court-martial had been

properly constituted, had jurisdiction of the person and offense or subject matter, and had power to impose the sentence. See, *e. g., Ex parte Reed,* 100 U. S. 13, 23. Under this concept, this Court has held insufficient to raise a jurisdictional issue allegations that one officer acted as accuser, prosecution witness, and member of the court (*Keyes* v. *United States*, 109 U. S. 336, 340); that a member of the court was biased against an accused (*Swaim* v. *United States*, 165 U. S. 553, 560–1); and that a confession was obtained by duress (*Collins* v. *McDonald*, 258 U. S. 416, 420–421).

The recent tendency by lower courts to expand the concept of jurisdiction has not been reflected in the recent decisions of this Court. In *Humphrey* v. *Smith*, 336 U. S. 695, this Court held, contrary to the trend in the lower courts, that failure to comply with the pre-trial investigation procedure of former Article of War 70 did not oust a court-martial of jurisdiction. And *Hiatt* v. *Brown*, 339 U. S. 103, went squarely counter to the tendency indirectly to review court-martial proceedings on the ground that a totality of errors would establish such lack of due process as to deprive the court-martial of jurisdiction.

There is in the subsequent decision of this Court in *Whelchel* v. *McDonald*, 340 U. S. 122, 124, a suggestion that denial of a truly basic right—specifically the opportunity to

raise before the military authorities a fundamental issue which should be considered by them—could amount to a jurisdictional defect. We may assume for this case that a jurisdictional issue would also be raised if there was in the military proceeding a defect so serious as to deprive it of the essential characteristics of a trial, as, for example, if there was a finding without hearing any evidence. But a jurisdictional issue is not presented merely by challenging as unfair or incorrect the manner in which a duly constituted court-martial (or reviewing authority) has determined an issue within its jurisdiction, or by claiming that the point of time at which, or the manner in which, the issue may be raised within the military proceedings amounts in effect to a denial of a fair opportunity to present the issue.

B. The reasons for the consistent position of this Court that review of courts-martial is strictly limited to fundamental matters of jurisdiction stem from the different natures and goals of military and civil life. The maintenance of discipline, and the concomitant necessity of punishing offenders, form an important and integral part of the military establishment whose primary function is to defend the country, and, in time of war, to win the war. The problem of balancing the needs of the defense forces against the traditional rights of an individual accused is es-

sentially a question for legislative judgment, and was recognized as such by the framers of the Constitution. The military courts are created by Congress under the authority conferred by the First Article of the Constitution; they are not courts with jurisdiction in law and equity within the meaning of the Third Article. *In re Vidal*, 179 U. S. 126. It is part of our constitutional pattern that "to those in the military or naval services of the United States, the military law is due process." *Reaves* v. *Ainsworth*, 219 U. S. 296, 304.

There are also practical reasons why review by civil courts should be strictly limited. The persons who participated in any particular court-martial may, by the time the matter comes up in civil courts, be stationed in distant places in performance of their primary duty to defend the country. The burden of collateral inquiry into their past actions should not lightly be imposed.

The limited function of the civil courts with respect to courts-martial is emphasized by the fact that Congress has shown itself to be well aware of its obligation to protect the fundamental rights of individuals subject to military law. The revisions of the Articles of War spell out the individual rights of the accused and provide complete and dispassionate review separate from the immediate command under which the court-martial is conducted. The military establish-

ment itself affords adequate machinery for an impartial trial and for the correction of trial error or unfairness.

C. When petitioners' general characterizations of a denial of fundamental rights to a trial are examined in the light of the facts alleged in support thereof, as well as of the record within the system of military justice, it is evident that petitioners are in actuality seeking review of military determinations with which they disagree, rather than attacking jurisdiction.

1. The admissibility of the Herman Dennis confessions was litigated at every step of the military process. Petitioner's attack on the holding of admissibility seeks merely a re-evaluation of the evidence pertaining to duress, a right he does not have. *Whelchel* v. *McDonald*, 340 U. S. 122, 124, 126. Such a contention would not support a collateral attack on a criminal judgment of conviction.

2. Insofar as the argument as to illegal detention is separate from that on the admissibility of the confessions, it clearly raises no issue of jurisdiction. Aside from the fact that the matter was presented to and decided by the military authorities, the rule of *McNabb* v. *United States*, 318 U. S. 332, is not imposed by the Due Process Clause and does not apply to courts-martial.

3. Although petitioners allege denial of effective assistance of counsel, it is indisputable that

(a) they did in fact have counsel who had ample time to prepare for trial and (b) that this issue was also presented to and determined by the military in the course of appellate review. Dennis is really seeking review of the careful decision of the military authorities as to the availability of Lt. Col. Daly, and Burns a review of the conduct of his own personally selected counsel.

4. The charge that the trials were conducted in an atmosphere of terror is unsupported by allegations of fact except a rumor that there would be a riot. That is not a sufficient allegation of fact for this serious charge, particularly where it appears on the face of the record that all members of the court were summoned from distant stations to conduct a trial at a place which was wholly under military control.

5. In the abstract, a charge of the knowing use of perjured testimony and knowing suppression of evidence may present a question so fundamental to the concept of a trial as to raise an issue of jurisdiction, if review by civil courts extends at all beyond the traditional limitations of jurisdiction. However, petitioners, in support of their charge, have filed affidavits which seem to indicate that the alleged facts were known to the affiants and to petitioners before trial. They have not made clear their ignorance nor alleged the fraud in sufficient detail to warrant the District Court in holding a hearing. Rather, they have

rested on wholesale and obscure charges, largely based on hearsay, which they have not connected with the prosecution or the actual trial in any substantial way. Moreover, the allegations were reviewed during the course of military review and were rejected after exhaustive and independent investigation. Petitioners are, therefore, simply asking civil courts to review a matter which was properly before and properly passed upon by the military authorities.

As to the allegation that the testimony of Calvin Dennis was perjured, the record of the Burns trial clearly shows that the credibility of Calvin Dennis was attacked on the ground that he had been offered inducements to testify. This allegation of the knowing use of perjured testimony is merely, once again, an indirect way of attempting to secure a redetermination of a dispute in issue at the trial.

II

Even assuming that the allegations of the knowing suppression of relevant evidence and use of perjured testimony were sufficient, and that, under a broader concept of jurisdiction, some of the other allegations could be deemed to raise jurisdictional issues, the court below was clearly correct in holding that no hearing was required, since the District Court could, on examination of the record, properly adopt the findings made

by the military in the course of the corrective process available within the system of military justice.

In view of the constitutional and historical separation of military and civil courts, the court below was justified in applying to habeas corpus review of court-martial judgments the general principles governing the reviewability, in federal habeas corpus, of state court judgments. See *Gusik* v. *Schilder*, 340 U. S. 128, 131–132.

A. It is well-established that, where the constitutional questions raised by a person convicted in a state court have been adjudicated on the merits in the state corrective proceedings, a federal court will not re-examine the questions thus adjudicated unless the state system was unable to afford a constitutionally adequate process for relief, or some "exceptional circumstances of peculiar urgency are shown to exist." *E. g., Ex parte Hawk*, 321 U. S. 114, 117, 118.

Petitioners were given full opportunity to, and did, tender before the military appellate authorities, and in the proceedings for a new trial, exactly the same issues raised in their habeas corpus petitions. The appellate and corrective processes within the Air Force and the executive branch were plainly adequate in structure and powers. In particular, under the new trial procedure of former Article of War 53 (10 U. S. C. (Supp. II) 1525), and its successors in the Uniform

Code of Military Justice, Congress made broad provision for post-conviction hearings and redress of wrongs. Such procedure is fundamentally fair. The fact that it may not in all respects accord with that in civil cases is not a valid objection. Cf. *United States* v. *Fletcher*, 148 U. S. 84. The record shows that each of petitioners' contentions was carefully considered, even to the point of a special independent investigation of the allegations relating to matters outside the record, and the results of the investigation were re-examined by a special board of officers after hearing petitioners' counsel in support of the motions for a new trial, as well as by The Judge Advocate General. Hence the habeas corpus court properly could and should, in the exercise of its discretion based on the military record before it, adopt the military findings without an additional hearing. *Darr* v. *Burford*, 339 U. S. 200.

B. Moreover, the Court of Appeals did not content itself with summarily accepting the military findings, but made a careful review of the materials pertaining to each of petitioners' charges. This review reinforces the correctness of its conclusion that the process of military review had fairly determined the issues against petitioners.

ARGUMENT

I

THE PETITIONS FOR HABEAS CORPUS, WHEN CONSIDERED WITH BOTH THE FACTS ALLEGED IN SUPPORT AND THE MILITARY RECORD, RAISE NO ISSUE OF JURISDICTION, WHICH ALONE IS WITHIN THE COMPETENCE OF CIVIL COURTS TO REVIEW

A. REVIEW OF COURTS-MARTIAL BY CIVIL COURTS IS STRICTLY LIMITED TO ISSUES OF JURISDICTION

Throughout the history of the United States, this Court has consistently and repeatedly held that it is not the function of the civil courts to review trials by court-martial except to determine whether the court-martial was acting within its jurisdiction. The scope of civil review was succinctly expressed in the case of *In re Grimley*, 137 U. S. 147, 150, as follows:

> It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction.

This concept of the separateness of courts-martial and their immunity from civil review except

on jurisdictional grounds was suggested in the early opinions of Chief Justice Marshall in *Wise* v. *Withers,* 3 Cranch 331, and *Ex Parte Watkins,* 3 Pet. 193. See also *Martin* v. *Mott,* 12 Wheat. 19, 38–39. It was explicitly articulated in *Dynes* v. *Hoover,* 20 How. 65, 82–83. Succeeding decisions have limited collateral inquiry to whether the court-martial had been properly constituted, had jurisdiction of the person and offense or subject matter, and had power to impose the sentence. *Ex Parte Reed,* 100 U. S. 13, 23; *Ex Parte Mason,* 105 U. S. 696, 699; *Keyes* v. *United States,* 109 U. S. 336, 340; *Wales* v. *Whitney,* 114 U. S. 564, 570; *Kurtz* v. *Moffitt,* 115 U. S. 487, 500; *Smith* v. *Whitney,* 116 U. S. 167, 177–179, 186; *Runkle* v. *United States,* 122 U. S. 543, 556; *In re Grimley,* 137 U. S. 147, 150; *Mullan* v. *United States,* 140 U. S. 240, 245; *United States* v. *Fletcher,* 148 U. S. 84, 91–92; *Johnson* v. *Sayre,* 158 U. S. 109, 118; *Swaim* v. *United States,* 165 U. S. 553, 555, 561, 562, 565, 566; *Carter* v. *Roberts,* 177 U. S. 496, 498; *Carter* v. *McClaughry,* 183 U. S. 365, 380–381, 382–401; *McClaughry* v. *Deming,* 186 U. S. 49, 63, 69; *Bishop* v. *United States,* 197 U. S. 334; *Grafton* v. *United States,* 206 U. S. 333, 345–348; *Mullan* v. *United States,* 212 U. S. 516, 520; *Givens* v. *Zerbst,* 255 U. S. 11, 19; *Collins* v. *McDonald,* 258 U. S. 416, 418, 420–421; *French* v. *Weeks,* 259 U. S. 326, 335–336 (military boards and courts of inquiry); *Gregory* v. *Weeks,* 259

U. S. 336, 343–344 (the same); *Ex Parte Quirin,* 317 U. S. 1 (military commission); *In re Yamashita,* 327 U. S. 1, 8–9 (military commission); *Humphrey* v. *Smith,* 336 U. S. 695, 696; *Wade* v. *Hunter,* 336 U. S. 684, 688; *Hiatt* v. *Brown,* 339 U. S. 103, 110–111; *Whelchel* v. *McDonald,* 340 U. S. 122, 124; *Gusik* v. *Schilder,* 340 U. S. 128, 132–133.

Errors, improprieties, and irregularities not going to jurisdiction have not been enough to invoke civil review, and the civil courts cannot review and weigh evidence, pass on evidentiary or procedural rulings, or determine the guilt or innocence of the accused. The extent to which the concept of "jurisdiction" has been limited in the past is well illustrated by *Keyes* v. *United States,* 109 U. S. 336, where the Court declared itself without power to set aside a court-martial conviction in which one officer acted as accuser, prosecution witness, and a member of the court, although the Court took pains to point out that it was expressing "no opinion as to the propriety of the proceedings of the court-martial in the respects in which they are assailed" (109 U. S. at 340). In *Swaim* v. *United States,* 165 U. S. 553, 560–561, the civil courts refused to review, as beyond their competence, the action of a court-martial in permitting an officer to sit as a member whom the accused had several times severely criticized and who, it was charged, was therefore an enemy of the accused. And in *Collins* v. *Mc-*

Donald, 258 U. S. 416, 420–421, the Court declared that admission of a confession allegedly procured by the accused's superior officer by the exercise of duress was "an error in the admission of testimony, which cannot be reviewed in a *habeas corpus* proceeding." See also, *e.g., Carter* v. *Woodring,* 92 F. 2d 544, 546 (C. A. D. C.), certiorari denied, 302 U. S. 752 (alleged subornation of perjury by trial judge advocate, prior agreement of members of court to convict accused, instructions by superior to court members to convict, etc.); *Ex Parte Tucker,* 212 Fed. 569 (D. Mass.) (violation of statutory prohibition forbidding judge advocate to be present during closed session of court-martial).

It was not until recently, starting about 1943 with the case of *Schita* v. *King,* 133 F. 2d 283 (C. A. 8), certiorari denied, 322 U. S. 761 (cf. *Schita* v. *Cox,* 139 F. 2d 971 (C. A. 8), certiorari denied, 322 U. S. 761), that there began to appear, in the lower federal courts, a tendency to broaden the concept of jurisdiction beyond the traditional limitations established by the earlier decisions. See Pasley, *The Federal Courts Look at the Court-Martial* (1950) 12 Univ. of Ptt. L. Rev. 7, 25–34. That tendency has not been reflected in the recent decisions of this Court.

Thus, one of the major bases for attack on courts-martial in recent cases was the claim that failure strictly to comply with the pre-trial investigation procedure of former Article of War

70 (10 U. S. C., 1946 ed., 1542) resulted in ousting the court-martial of jurisdiction. See, *e. g.*, *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2), certiorari denied *sub nom. Henry* v. *Smith*, 336 U. S. 968; *Reilly* v. *Pescor*, 156 F. 2d 632, 634–635 (C. A. 8), certiorari denied, 329 U. S. 790; *De War* v. *Hunter*, 170 F. 2d 993, 995–997 (C. A. 10), certiorari denied, 337 U. S. 908; *Benjamin* v. *Hunter*, 169 F. 2d 512 (C. A. 10); and see Note, *The Preliminary Investigation in the Army Court-Martial System—Springboard for Attack by Habeas Corpus* (1949), 18 Geo. Wash. L. Rev., 67 ff. When that issue came before this Court, it held that the requirements of Article of War 70 were not mandatory and that failure to comply therewith was not jurisdictional. *Humphrey* v. *Smith*, 336 U. S. 695.[29] And in *Wade* v. *Hunter*, 336 U. S. 684, 688 (fn. 4), the Court expressly passed over the issue of the extent to which a court-martial's overruling of a plea of former jeopardy under the Fifth Amendment is subject to collateral attack in habeas corpus.

Even more important is the fact that this Court, in *Hiatt* v. *Brown*, 339 U. S. 103, went squarely counter to the tendency which had developed in the lower federal courts indirectly to review court-martial proceedings on the ground that a totality

[29] It is to be noted that many of the cases on due process cited in footnote 28 of the Court of Appeals' opinion below (R. 30) revolved around Article of War 70.

of errors would establish such lack of due process as to deprive the court-martial of jurisdiction. See, *e. g.*, *Schita* v. *King*, 133 F. 2d 283 (C. A. 8), certiorari denied, 322 U. S. 761; *United States* v. *Hiatt*, 141 F. 2d 664, 666 (C. A. 3); *Waite* v. *Overlade*, 164 F. 2d 722, 724 (C. A. 7), certiorari denied, 334 U. S. 812; *United States ex rel Weintraub* v. *Swenson*, 165 F. 2d 756 (C. A. 2); *De Wair* v. *Hunter*, 170 F. 2d 993, 996–997 (C. A. 10), certiorari denied, 337 U. S. 908; *Montalvo* v. *Hiatt*, 174 F. 2d 645 (C. A. 5), certiorari denied, 338 U. S. 874; *Hicks* v. *Hiatt*, 64 F. Supp. 238, 249–250 (M. D. Pa); *Anthony* v. *Hunter*, 71 F. Supp. 823 (D. Kan.); *Boone* v. *Nelson*, 72 F. Supp. 807, 808 (D. Me.). In the light of this trend of lower court decisions, it is significant that this Court reversed such a "due process" holding and expressly reaffirmed the traditional scope of civil review of courts-martial, stating (*Hiatt* v. *Brown*, 339 U. S. 103, 110–111):

> The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the com-

petence of the law member and defense counsel. Cf. *Humphrey* v. *Smith*, 336 U. S. 695 (1949). It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * * The single inquiry, the test, is jurisdiction." *In re Grimley*, 137 U. S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. *In re Yamashita*, 327 U. S. 1, 8–9 (1946); *Swaim* v. *United States*, *supra*, 165 U. S. at 562.

The Court of Appeals below attached considerable significance to the use of the phrase "acted within its lawful powers" in the *Hiatt* v. *Brown* opinion, *supra*, and construed that expression as implying a broader scope of review than has been traditional. Such an interpretation of the opinion is not well founded. The quoted expression is not new; it has been employed repeatedly over a period of years to epitomize the jurisdictional requirement that the sentence imposed by a court-martial be within the maximum limit prescribed for the offense. Thus, in 1895, in *Johnson* v. *Sayre*, 158 U. S. 109, 118, the Court held:

> The court martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise.

See, to the same effect, *Swaim* v. *United States,* 165 U. S. 553, 561 (1897). In 1902, in *Carter* v. *McClaughry,* 183 U. S. 365, 380–381, the Court quoted from *Carter* v. *Roberts,* 177 U. S. 496, as follows:

> * * * Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

In 1922, in *Collins* v. *McDonald,* 258 U. S. 416, 418, the Court said:

> If the District Court had issued the writ as prayed for, the only questions it would have been competent for it to hear and determine would have been, "Did the court martial which tried and condemned the prisoner have jurisdiction, of his person, and of the offense charged, and was the sentence imposed within the scope of its

lawful powers?" "The single inquiry, the test, is jurisdiction . . ."[21]

In the light both of these previous decisions in which similar language was employed and of the *Brown* holding itself, it seems clear to us that the use of the expression, "acted within its lawful powers," in *Hiatt* v. *Brown*, denoted no change in the matters of court-martial "jurisdiction" subject to review in habeas corpus. Certainly, giving it the reading most favorable to petitioners, *Hiatt* v. *Brown* holds (at least) that an allegation of lack of due process, supported merely by claimed errors as to matters which were in issue at the court-martial or in the course of military review, is not sufficient to raise an issue of jurisdiction. It is revealing that Circuit Judge Biggs, who before the *Brown* decision had, in *Hicks* v. *Hiatt*, 64 F. Supp. 238 (M. D. Pa.), given a sweeping interpretation to the concept of jurisdiction as embracing a claim of unfairness, has construed the *Brown* decision as leaving the district courts "no area of supervision or correction" beyond the historical concept of jurisdiction.

[21] In *Dynes* v. *Hoover*, 20 How. 65, 80, 81, 82, the Court spoke, by way of dictum, of deviations from certain essential rules in a court-martial proceeding as rendering the court-martial *coram non judice*. See also *Runkle* v. *United States*, 122 U. S. 543, 556 ("that all the statutory regulations governing its proceedings had been complied with"). The *Runkle* decision is criticized and limited in *United States* v. *Fletcher*, 148 U. S. 84, 90, and *Bishop* v. *United States*, 197 U. S. 334, 342.

United States ex rel. McClellan v. *Humphrey*, 181 F. 2d 757, 759 (C. A. 3).

There is in the subsequent decision of this Court in *Whelchel* v. *McDonald*, 340 U. S. 122, an obiter suggestion that denial within the court-martial system of a truly fundamental right may amount to a jurisdictional defect. That opinion states (at p. 124):

> We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction.

But the opinion itself indicates that any claim of lack of due process must relate to a matter which is truly and basically jurisdictional, for the Court went on to say (at p. 126):

> Any error by the military in evaluating the evidence on the question of insanity would not go to *jurisdiction, the only issue before the court in habeas corpus proceedings.* [Italics supplied.]

And in *Gusik* v. *Schilder*, 340 U. S. 128, decided the same day, this Court referred to *In re Grimley*, 137 U. S. 147, 150 (*supra*, p. 38), for the proposition that the civil courts have traditionally exercised no power of supervision or review over courts-martial, and stated (at page 132):

> . . . These [military] tribunals have operated in a self-sufficient system, save only as habeas corpus was available to test their jurisdiction in specific cases.

See also 340 U. S. at 133, stressing jurisdiction as the only issue open in habeas corpus.

The Court has thus made it clear, recently as well as in past decisions, that it is not the function of the civil courts to re-evaluate matters determined in the military proceedings. Even the suggestion in the *Whelchel* opinion implies no more than that a jurisdictional question may be presented if opportunity is denied to raise before the military authorities a fundamental issue which should be considered by them. Though some earlier decisions look the other way (*supra*, pp. 39–40; see, especially, *Keyes* v. *United States*, 109 U. S. 336, and *Carter* v. *Woodring*, 92 F. 2d 544 (C. A. D. C.), certiorari denied, 302 U. S. 752), we may also assume for this case that a jurisdictional issue would be raised if there was in the military proceeding a defect so serious as to deprive it of the essential characteristics of a trial, as, for example, if there was a finding by the court-martial without hearing any evidence.[21a]

[21a] In *Dynes* v. *Hoover*, 20 How. 65, 82, the Court, in speaking of void court-martial proceedings, said that it did "not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but [of] a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law." Cf. *Mullan* v. *United States*, 212 U. S. 561, 570.

But a jurisdictional issue is not presented merely by challenging as unfair or incorrect the manner in which a duly constituted court-martial (or a reviewing authority) has determined an issue within its jurisdiction, or by claiming that the point of time at which, or the manner in which, the issue may be raised within the military proceedings amounts in effect to a denial of a fair opportunity to present the issue. The Court of Appeals below, in assuming that it had authority to review the military proceedings on a broad base to determine whether in their totality they accorded with due process, assumed a power which this Court has held to be beyond the competence of civil courts and thus accorded to petitioners a greater right of review than was their due.

B. UNDER THE CONSTITUTION, THE REGULATION OF COURTS-MARTIAL IS A MATTER FOR CONGRESS AND NOT FOR THE COURTS

This Court has seldom articulated the reasons why it has so consistently maintained the position that review of courts-martial by civil courts is to be strictly limited to fundamental matters of jurisdiction, but it is evident that they stem from the different natures and goals of military and civil life. The maintenance of discipline, and the concomitant necessity of punishing offenders, form an important and integral part of the military establishment whose primary function is to defend the country, and in time of war, to win the

war. The problem of balancing the needs of the defense forces against the traditional rights of an individual accused is essentially a question for legislative judgment, and was recognized as such by the framers of the Constitution. The military courts are created by Congress under the authority conferred by the First Article of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces"; they are not courts "with jurisdiction in law or equity" within the meaning of the Third Article of the Constitution. *In re Vidal*, 179 U. S. 126; *Ex parte Vallandigham*, 1 Wall. 243; *Ex parte Quirin*, 317 U. S. 1, 39. Thus, it is part of our constitutional pattern that for those in the armed services it is for Congress to determine, in large part, what is the proper process, and that "to those in the military or naval services of the United States the military law is due process." *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *French* v. *Weeks*, 259 U. S. 326, 335; *Creary* v. *Weeks*, 259 U. S. 336, 344.[32] It has always been recog-

[32] See also *Ex parte Milligan*, 4 Wall. 2, 123, where this Court said:

"The discipline necessary to the efficiency of the army and navy, require other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service."

nized that a matter relating to the organization and administration of courts-martial is "a matter appropriate for congressional action." *Whelchel* v. *McDonald,* 340 U. S. 122, 127. The problem of applying to courts-martial the principles of basic fairness which would constitute due process in a military trial is likewise for Congress, and the execution of the congressional decision is primarily for the executive. The function of the judiciary is to see that the courts-martial act within the area in which they are confined by Congress.

Moreover, there are practical reasons why review by civil courts should be strictly limited. If review by habeas corpus should be widely allowed on grounds which raise issues of fact rather than of law, the necessity for a hearing could cause disruption to the military establishment. The extent of habeas corpus attacks on federal criminal convictions proved sufficiently burdensome to give rise to the new procedure embodied in 28 U. S. C. 2255. Permitting wide review of trials conducted by persons whose primary duty is, not judging, but defending our nation, is bound to be much more disruptive. That is particularly true today in view of the far-flung nature of our military forces. The persons who participated in any particular court-martial may, by the time the matter comes up in civil courts, be stationed in such distant

places as Guam or Korea or Europe. The necessity of obtaining their testimony, even by deposition, can be a real burden, and if civil hearings are to become common the burden will be multiplied many-fold. It is also, we believe, appropriate to recall that judicial unfamiliarity with military life, military law, and the processes of military justice can easily lead to erroneous evaluations of military conduct leading to unnecessary but far-reaching intervention in military affairs. See *Carter* v. *McLaughry*, 183 U. S. 365, 400–401; *Swaim* v. *United States*, 165 U. S. 553, 561–562; *Smith* v. *Whitney*, 116 U. S. 167, 178–179; *Dynes* v. *Hoover*, 20 How. 65, 82.

The limited function of the civil courts with respect to courts-martial is emphasized by the fact that Congress has shown itself to be well aware of the obligation imposed upon it by the Constitution to protect the fundamental rights of the individuals subject to military law. The Articles of War spell out the individual rights of the accused and provide a complete and dispassionate review separate from the immediate command under which the court-martial is conducted. The military establishment itself affords adequate machinery for the impartial trial of offenses and for the correc-

tion of trial error or unfairness. The rights which the serviceman may have under the Fifth Amendment (cf. *Johnson* v. *Eisentrager*, 339 U. S. 763, 783; *Ex parte Quirin*, 317 U. S. 1, 45; *Ex parte Milligan*, 4 Wall 2, 138 (opinion of Chase, C. J.)) and other constitutional provisions, or under the statutory rules governing military tribunals, can be, and are being, protected within the military justice system.

After World War I, Congress enacted a revision of the Articles of War (41 Stat. 759, 787), the basic purpose of which was to emphasize the justice aspects of military trials. See Ansell, *Some Reforms in Our System of Military Justice* (1922), 32 Yale Law Journal 146; Morgan, *The Existing Court-Martial System and the Ansell Army Articles* (1919), 29 Yale L. J. 52; Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War* (1921), 12 Am. J. Crim. L. *and Criminology* 84. It provided many protections, such as the requirement of preliminary investigation in former Article of War 70 (10 U. S. C., 1946 ed., 1542); the right to counsel in former Articles of War 11 and 17 (10 U. S. C., 1946 ed., 1482 and 1488); the prohibition against reconsideration of an acquittal or increase of sentence on review, in former Article of War 40 (10 U. S. C., 1946 ed., 1511). Former Article of

War 50½ (10 U. S. C., 1946 ed., 1522) established the system of appellate review by the Boards of Review with provision for a new trial in proper cases.

This system, after World War II, was the subject of a number of studies and investigations. See, *e. g.*, Holtzoff, *Administration of Justice in the United States Army* (1947), 22 N. Y. U. L. Q. Rev. 1, for a summary of the findings of the War Department's Advisory Committee on Military Justice. A Congressional subcommittee of the 79th Congress devoted more than a year to a detailed study of the Army system of justice (H. Rep. No. 2722, 79th Cong., 2d sess.).

The result was the revision of the Articles of War, 62 Stat. 627 (See H. Rep. 1034, 80th Cong. 1st Sess.) which, as implemented by the 1949 Manual for Courts Martial, United States Air Force (promulgated under Executive Order No. 10026, effective February 1, 1949), governed the proceedings against these petitioners. The amended Articles permitted enlisted personnel to serve on courts-martial on request of enlisted accused (Article of War 4, 10 U. S. C. (Supp. II) 1475); required the law member to be a lawyer (Article of War 8, 10 U. S. C. (Supp. II) 1479); provided that, if available, the trial judge advocate and defense counsel of general courts-

martial be lawyers (Article of War 11, 10 U. S. C. (Supp II) 1482). To meet the criticism of command influence, Article of War 88 (10 U. S. C. (Supp. II) 1560) provided that no convening authority or other commanding officer "may censure, reprimand or admonish" the court-martial or any member thereof "with respect to the findings or sentence adjudged by the court, or with respect to any other exercise * * * of its or his judicial responsibility." As to appellate review, the amended Articles of War created, in addition to the Board of Review set up by the 1920 revision, an additional appellate agency, known as the Judicial Council, composed of three general officers of the Judge Advocate General's Department; the revision granted both reviewing agencies, and The Judge Advocate General as well, "authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact" (Article of War 50, 10 U. S. C. (Supp. II) 1521). The amended Articles also contained the special legislation which was before this Court in *Gusik* v. *Schilder,* 340 U. S. 128, providing the right to petition for a new trial on broad grounds and establishing within the military establishment an additional corrective process. See Wallstein, *The Revision of*

the Army Court-Martial System (1948) 47 Col. L. Rev. 219.[23]

It is thus evident that Congress has not been unmindful of its constitutional duty to provide a comprehensive system of military justice. There is no basis in law or necessity for permitting or requiring civil courts to give a broad and general review of court-martial proceedings under the guise of determining whether due process has been accorded. Congress has assured due process to those in the military (cf. *Reaves* v. *Ainsworth,* 219 U. S. 296) and has given them the opportunity to bring before properly constituted military authorities all matters pertaining to their guilt or innocence, including the automatic right of review. Petitioners have been accorded all the rights granted to them under this system established by Congress, and

---

[23] In 1950, following the unification of the armed services, 64 Stat. 495, Congress enacted the Uniform Code of Military Justice; 64 Stat. 107, which applied to the Navy and the Coast Guard the same procedure governing the Army and the Air Force, with some new provisions: *e. g.*, a provision making mandatory the practice which prevailed under the 1948 Articles of having legally trained counsel for both prosecution and defense at general courts-martial (Art. 27, 50 U. S. C. (Supp. V) 591); and a provision removing the law officer (formerly the law member) from membership on the court (Art. 26, 50 U. S. C. (Supp. V) 590). The Code substituted for the Judicial Council a Court of Military Appeals, composed of civilians, to review errors of law only, automatically in capital cases among others, and on petition in the remaining cases (Art. 67, 50 U. S. C. (Supp. V) 654). By Executive Order 10214, dated February 8, 1951, the President prescribed a new Manual for Courts-Martial which became effective May 31, 1951.

have had the opportunity to present all their contentions.[24]

C. THE PETITIONS FOR HABEAS CORPUS RAISE NO JURISDICTIONAL ISSUE

If we are correct in our interpretation of the scope of review of courts-martial by civil courts in habeas corpus, then the petitions in the instant cases raised no jurisdictional issue within the

[24] It is noteworthy that in the Uniform Code of Military Justice Congress provided (50 U. S. C. (Supp. V) 663, 64 Stat. 132):

"Art. 76. *Finality of court-martial judgments.*

"The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as provided by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President."

The 1948 revision of the Articles of War contained a similar provision (Article of War 50 (h), 10 U. S. C. (Supp. II) 1521 (h)) as well as a finality provision with respect to actions on petitions for a new trial (Article of War 53, 10 U. S. C. (Supp. II) 1525). See *Gusik* v. *Schilder*, 340 U. S. 128, 132–133. Presumably, Article 76 of the Uniform Code, like the former Articles of War, does not deprive the courts of their habeas corpus jurisdiction over courts-martial (see Brief for Respondent, *Gusik* v. *Schilder*, October Term, 1950, No. 110, pp. 12–18), but we believe that it does indicate the congressional purpose to limit judicial intervention to the traditional minimum.

competence of a civil court to review, particularly when considered in the light of the military record. Petitioners did not challenge the jurisdiction of the person or the subject matter nor the propriety of the sentence imposed.[25] They did endeavor to couch their petitions in terms which, although this Court has never expressly so held, we have assumed for the purposes of the case would, under modern concepts, be sufficient to

[25] (a) The courts-martial were lawfully appointed by the Commanding General, Twentieth Air Force, empowered to appoint a general court-martial by Article of War 8 (10 U. S. C., 1946 ed., 1479). (b) Under the provisions of Article of War 92 (10 U. S. C., 1946 ed., 1564), the courts-martial had jurisdiction over the offenses of murder and rape. The jurisdiction conferred by this Article as to such offenses is qualified by the provision that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of "peace." However, the offenses here involved were committed on the Island of Guam, and thus not within the geographical limits of the States of the Union and the District of Columbia. Furthermore, the Joint Resolution of July 25, 1947, Chapter 327, Section 3, 61 Stat. 451, in terminating the state of war for certain purposes, did not terminate it for the purpose of Article of War 92 (see also *Kahn* v. *Anderson*, 255 U. S. 1, 9–10). (c) Petitioners were subject to be tried by court-martial since they were members of the United States Air Force at the time of the commission of the offenses and of the trial by courts-martial, and were assigned to the 12th Air Ammunition Squadron situated on the Island of Guam. (d) The death sentences adjudged by the courts-martial were authorized by Article of War 92 which at the time of the commission of the offenses provided that any person subject to military law who commits murder or rape shall suffer death or imprisonment for life as a court-martial may direct (10 U. S. C., 1946 ed., 1564).

raise a jurisdictional issue, *i. e.*, denial of opportunity to be heard on their guilt or innocence in a hearing that can fairly be characterized as a trial. However, when the petitioners' general characterizations of a denial of fundamental rights to a trial are examined in the light of the facts alleged in support of the allegations, as well as of the record within the system of military justice,[26] it is evident from the petitions themselves that, in actuality, petitioners are merely seeking redetermination of issues which they could and did fairly present before the military authorities and which those authorities fairly considered. They really are seeking review of military determinations with which they disagree, and are not merely attacking jurisdiction. As a matter of fact, some of petitioners' allegations do not raise an issue of jurisdiction within the concept of jurisdiction that pertains in relation to collateral attack on federal criminal convictions.

1. *Confessions.*—Certainly Dennis' attack on the admissibility of his confessions raises no jurisdictional question. Petitioner was not only given the opportunity to, but actually did, raise that issue in the court-martial itself and at every subsequent stage of review. The petitioner seeks merely re-evaluation of the evidence pertaining to coercion and duress, a right he clearly does not

[26] It is established that the sufficiency of the petitions must be tested in the light of the return. *Walker* v. *Johnston*, 312 U. S. 275, 284. See the opinion below, R. 23, fn. 1.

have. *Whelchel* v. *McDonald*, 340 U. S. 122, 124, 126 (*supra*, p. 47); *Collins* v. *McDonald*, 258 U. S. 416, 420–421 (*supra*, p. 41); *Swaim* v. *United States*, 165 U. S. 553, 560–561 (*supra*, pp. 40–41); *Romero* v. *Squier*, 133 F. 2d 528, 532 (C. A. 9) (defense of entrapment), certiorari denied, 318 U. S. 785. As the court below pointed out (R. 36), "Upon the face of the papers presented by the petitioner the issue was, in the light most favorable to him, clearly debatable, and there was substantial evidence in support of the conclusion" against his allegations. An objection to the admissibility of evidence, even on constitutional grounds, does not support a collateral attack on criminal judgments by either habeas corpus or a motion under 28 U. S. C. 2255.[27] *Smith* v. *United States*, 187 F. 2d 192, 197 (C. A. D. C.), certiorari denied, 341 U. S. 927; *Burall* v. *Johnston*, 134 F. 2d 614 (C. A. 9), certiorari denied, 319 U. S. 768.[28]

[27] The same comments apply to the charge that Calvin Dennis' confessions were coerced.

[28] The failure, if any, to advise Herman Dennis of his constitutional privilege against self-incrimination, did not render the hair inadmissible in evidence. *Powers* v. *United States*, 223 U. S. 303, 314; *Wilson* v. *United States*, 162 U. S. 613, 623; *United States* v. *Freeman*, 167 F. 2d 786, 790–791 (C. A. 7), certiorari denied, 335 U. S. 817; *United States* v. *Klinger*, 136 F. 2d 677, 678 (C. A. 2), certiorari denied, 320 U. S. 746.

Moreover, it has been held, in an opinion by Mr. Justice Holmes, that an error, if it be one, in requiring a defendant to stand up and walk before the jury (an alleged violation of the right against self-incrimination) did not go to the jurisdiction of a territorial court so as to be attackable on habeas corpus. *Matter of Moran*, 203 U. S. 96, 105.

2. *Detention.*—Insofar as the argument is separate from that on the admissibility of the various confessions, petitioners' allegations concerning their detention in the Guam jail—a contention also presented to and decided by the military authorities—obviously raise no issue of jurisdiction. The rule of *McNabb* v. *United States,* 318 U. S. 332, applies only in the federal courts and is not imposed by the due process clause. See *McNabb* v. *United States,* 318 U. S. at 340; *Lyons* v. *Oklahoma,* 322 U. S. 596, 597; *Gallegos* v. *Nebraska,* 342 U. S. 55, 63–64, 72, 73. And even if, as is not the case, a similar rule were made applicable by military law, violation of the rule would not deprive the court-martial of jurisdiction or render the proceedings null and void, *Richardson* v. *Zuppmann,* 81 F. Supp 809, 813–814 (M. D. Pa.), affirmed on the opinion below, 174 F. 2d 829 (C. A. 3). Federal criminal convictions obtained in violation of the *McNabb* rule cannot be attacked on that ground in habeas corpus. *Miller* v. *Hiatt,* 141 F. 2d 690 (C. A. 3); *Smith* v. *United States,* 187 F. 2d 192, 197 (C. A. D. C.), certiorari denied, 341 U. S. 927, and cases cited. (See also *infra,* pp. 77 ff.)

3. *Counsel.*—Although petitioners allege denial of effective assistance of counsel, it is indisputable that (a) they did in fact have counsel who had ample time to prepare for trial (*supra,* pp. 12–14, 17–18) and (b) that this issue was presented to and determined by the military in the course of appellate review (*supra,* pp. 20–21.

22, 25). Dennis is really seeking review of the decision of the military authorities as to the availability of Lt. Col. Daly,[29] and Burns a review of the conduct of his own personally selected counsel. Certainly the competence and preparation of counsel do not present an issue which goes to the jurisdiction of the court-martial. *Hiatt* v. *Brown*, 339 U. S. 103, 110–111, expressly so holds. Furthermore, the allegations of denial of the right to counsel are so clearly contradicted by the admitted facts (*supra*, pp. 12–14, 17–18; *infra*, pp. 79–80) as not to raise an issue which would require a hearing in a federal proceeding under 28 U. S. C. 2255. Cf. *Close* v. *United States*, 198 F. 2d 144 (C. A. 4), No. 130 Misc., O. T. 1952, certiorari denied, 344 U. S. 879.

4. *Alleged atmosphere of terror.*—The allegation that the trials were "conducted in an atmosphere of terror, hysteria and vengeance" is an obvious attempt to raise a jurisdictional issue within the concept applied to state courts in *Moore* v. *Dempsey*, 261 U. S. 86, but it is wholly unsupported by any facts except the statement in Chaplain Grimmett's affidavit that there was a rumor that a riot would ensue if a conviction was not obtained. Certainly, such a rumor is not an allegation of fact supporting this serious

[29] The determination of "availability" is not a matter reviewable in civil courts. Cf. *Hiatt* v. *Brown*, 339 U. S. 103; *Kahn* v. *Anderson*, 255 U. S. 1; *Swaim* v. *United States*, 165 U. S. 553; *Mullan* v. *United States*, 140 U. S. 240; *Bishop* v. *United States*, 197 U. S. 334; *Martin* v. *Mott*, 12 Wheat. 19.

charge, particularly where it appears on the face of the record that all members of the court were summoned from distant stations to conduct a trial at a place which is wholly under military control (*supra*, p. 6). To assume that a court-martial under such circumstances would be subject to mob domination is absurd. This issue too was presented to, and determined by the military authorities. *Supra*, pp. 21, 27–28.

5. *Alleged suppressed evidence and subornation of perjury.*—Only the allegations that the prosecution knowingly used perjured testimony[30] and knowingly suppressed material evidence present, on their face, an issue so fundamental to the concept of a trial as possibly to raise an issue of jurisdiction. These issues were also decided by the Air Force (*supra*, pp. 25–27). If review by civil courts extends at all beyond the traditional limitation of jurisdiction,[30] and if such review can be had at all where the claim had been fully considered by the military,[31] then

---

[30] *Carter* v. *Woodring*, 92 F. 2d 544, 546 (C. A. D. C.), certiorari denied, 302 U. S. 752 (*supra*, p. 41), held that a civil court could not inquire into far more extensive charges of subornation of perjury and suppression of evidence than those made here. See also *Keyes* v. *United States*, 109 U. S. 336, and *Swaim* v. *United States*, 165 U. S. 553, 560–561 (*supra*, p. 41).

[31] *Whelchel* v. *McDonald*, 340 U. S. 122, 124, indicates that a civil court would have no competence where the charge of perjury, etc., was made to, and determined by, the appropriate military authority. *Swaim* v. *United States*, 165 U. S. 553, 560–561, is to the same effect (charge that court-martial member was personally biased against accused).

it would seem that such a charge, if sufficiently supported by allegations of fact, would present a matter which could be inquired into by the civil courts on habeas corpus. Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

We do not believe, however, that the facts alleged in the petitions and affidavits support the charge made, when considered in the light of the record. It appears from the affidavit of Lt. Col. Daly, annexed to the petitions, that the alleged inducements to Calvin Dennis and the alleged existence of Philippine dog-tags and a blood-stained Navy officer's uniform were known to Daly before the trial. Similarly, it appears from the Daly affidavit, and those of Chaplain Grimmett and Miss Hill, that the asserted subornation of perjury and intimidation of witnesses by or on behalf of the prosecution were known to the affiants at the time the events occurred. There is no allegation in the petition that these alleged facts were not communicated by the affiants or others to petitioners or their counsel; the reasonable inference is that they were, and that if subornation or suppression occurred it was not unknown to petitioners or their counsel. The alleged existence of the dog-tags and Navy officer's uniform, and the alleged subornation, were not mentioned at the trial. If the defense knew the asserted facts and forbore to raise the issue, petitioners certainly could

not show denial of opportunity to present it. We doubt that, even in relation to a civil federal conviction, habeas corpus would lie on the basis of alleged facts which could have been and were not placed in issue at the trial. Cf. *Sunal* v. *Large*, 332 U. S. 174. And if the alleged facts were unknown at the time, it is incumbent on petitioners to make their ignorance clear and to allege the fraud in sufficient detail to warrant the district court in holding a hearing. Cf. *Darr* v. *Burford*, 339 U. S. 200, 218; *Schechtman* v. *Foster*, 172 F. 2d 339, 342 (C. A. 2), certiorari denied, 339 U. S. 924; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1). They have done neither, but instead have rested on wholesale and obscure charges, largely based on hearsay, which they have not connected with the prosecution or the actual trial in any substantial way.

In any event, as pointed out above (*supra*, pp. 25–27), the allegations were reviewed during the course of direct appellate review, under the military system, before the sentence became final. Petitioners had an opportunity to present, and did present, the issues before the appropriate military authorities. After exhaustive investigation, the charges were rejected. Petitioners are, therefore, simply asking civil courts to review a matter which was properly before and properly passed upon by the military authorities, and thus to undertake a function which this Court

has consistently held is not within the civil province.

As to Calvin Dennis, the record of the Burns trial clearly shows that the credibility of Calvin Dennis was attacked at the trial on the ground that he had been offered inducements to testify (TR (B) 70–73, 64–69). As to this charge, the allegation of the knowing use of perjured testimony is merely, once again, an indirect way of attempting to secure a redetermination of a dispute in issue at the trial. Of course, the mere fact of retraction by Calvin Dennis does not support the charge of knowing use of perjured testimony. It would not be a sufficient basis for a new trial in a federal criminal case, much less a basis for collateral attack. *Wild* v. *Oklahoma,* 187 F. 2d 409 (C. A. 10); *United States* v. *Cordo,* 186 F. 2d 144, 148 (C. A. 2), certiorari denied *sub nom. Minkoff* v. *United States,* 340 U. S. 952; *Martin* v. *United States,* 154 F. 2d 269, 270 (C. A. 6); cf. *Valdez* v. *United States,* 244 U. S. 432; *Cobb* v. *Hunter,* 167 F. 2d 888 (C. A. 10), certiorari denied, 335 U. S. 832; *Slappey* v. *United States,* 110 F. 2d 528 (C. A. 5); *Henry* v. *United States,* 12 F. 2d 670 (C. A. 9).

II

THE COURT OF APPEALS CORRECTLY HELD THAT, IN VIEW OF THE FACT THAT ALL ISSUES RAISED BY THE PETITIONS FOR HABEAS CORPUS HAD BEEN CONSIDERED AND PASSED UPON BY THE MILITARY AUTHORITIES, THE DISTRICT COURT PROPERLY DENIED THE PETITIONS WITHOUT A HEARING ON THE BASIS OF THE MILITARY RECORD

Even assuming that the allegations of the knowing suppression of relevant evidence and the knowing use of perjured testimony were sufficiently supported to present an issue within the competence of civil courts to review, and even assuming that, under a broader concept of jurisdiction, some of the other allegations made by petitioner could be deemed to raise jurisdictional issues, the court below was clearly correct in holding that no hearing was required, since the district court could, on examination of the record, properly adopt the findings made by the military in the course of the corrective process available within the system of military justice.

The military record clearly establishes that every allegation made in the petitions for habeas corpus was presented before the military authorities in the course of review by the Board of Review, the Judicial Council, and The Judge Advocate General, and the review in connection with the application for a new trial under former Article of War 53 (10 U. S. C. (Supp. II)

1525). The record also shows that each contention was carefully considered, even to the point of ordering a special investigation of the allegations relating to the matters outside the court-martial record. See Statement, *supra*, pp. 18–28. In view of the fact that, as we have demonstrated in Point I, the system of military courts is, under our Constitution, and has from the beginning of our history been recognized as, a system as essentially separate from federal civil courts as are the judicial systems of the several states, the court below was justified in applying to habeas corpus review of court-martial judgments the general principles governing the reviewability by habeas corpus of state court judgments. This Court itself recognized the aptness of that analogy in *Gusik* v. *Schilder*, 340 U. S. 128, 131–132.

A. It is well established that where the constitutional questions raised by a person convicted in a state court have been considered and adjudicated on the merits in the state corrective proceedings, a federal court will ordinarily not re-examine, upon a writ of habeas corpus, the questions thus adjudicated, unless under its peculiar organization the state system was unable to afford a constitutionally adequate process for relief, or some "exceptional" circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U. S. 114, 117, 118; *House* v. *Mayo*, 324 U. S. 42, 48; *United States ex rel. Kennedy*

v. *Tyler,* 269 U. S. 13, 17; *Coggins* v. *O'Brien,* 188 F. 2d 130, 133, 137, 143–144, 150 (C. A. 1); *Goodwin* v. *Smyth,* 181 F. 2d 498 (C. A. 4); *Gault v. Burford,* 173 F. 2d 813 (C. A. 10); *Schechtman* v. *Foster,* 172 F. 2d 339 (C. A. 2), certiorari denied, 339 U. S. 924; cf. *Mooney* v. *Holohan,* 294 U. S. 103; *Moore* v. *Dempsey,* 261 U. S. 86, 91, 92.[32] Thus, if the corrective process

---

[32] The application of such doctrine is not in conflict with the decision in *United States ex rel. Smith* v. *Baldi,* 192 F. 2d 540, 544 (C. A. 3), certiorari granted, 343 U. S. 903, or with *Moore* v. *Dempsey,* 261 U. S. 86. The doctrine that a federal court in a habeas corpus proceeding involving an attack on a judgment of a state court could adopt the findings of the latter on the issues presented was not disputed in the *Smith* case. There the Court of Appeals stated that the mere fact that matters averred in a federal petition for habeas corpus had "been decided on the merits by the highest state court is a fact to be given weight by a district court in passing upon petitions for habeas corpus. But that fact does not relieve the federal court of the duty to pass upon the merits of the petition" (192 F. 2d at 544). However, it is possible "to pass upon the merits of a petition" without a hearing thereon. Thus, what the court meant in the *Smith* case was that a federal court could not deny a habeas corpus petition merely because the issues raised therein had been adjudicated by a state court, but that it could adopt the findings of the state court and consider them against the allegations of the petition, which could be done without a hearing, as it was in the instant case and the *Smith* case. See also *Coggins* v. *O'Brien,* 188 F. 2d 130 (C. A. 1).

In *Moore* v. *Dempsey,* *supra,* the record showed that the existing corrective process of the state was inadequate to correct the alleged wrongs, because mob hysteria had permeated not only the trial procedure but the entire state judicial system, including its appellate processes, as well as

of a non-federal tribunal is shown to be adequate for the protection of one's fundamental human rights and such protection has been accorded an accused in consonance with the constitutional due process requirement, federal courts will not interfere by habeas corpus. See *Moore* v. *Dempsey, supra;* see also *Frank* v. *Mangum,* 237 U. S. 309. This rule is predicated, primarily, upon the "respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours." *Coggins* v. *O'Brien,* 188 F. 2d 130, 133 (C. A. 1); see *Darr* v. *Burford,* 339 U. S. 200, 205. As we have shown, the desirability of preserving the historical and constitutional separation of the civil and military powers is at least as good a reason for holding the rule applicable to judgments by courts-martial. Cf. *Gusik* v. *Schilder,* 340 U. S. 128, 131–132. Judgments of courts-martial, when affirmed by the required reviewing authority, are "final and conclusive," just as those of any state court, and hence "binding upon all departments, courts, agencies, and officers of the United States," subject only to review upon collateral attack in habeas corpus.

---

the executive branch of the government, so that the federal court could not in good faith adopt the findings of the state court. Under the circumstances in that case, it was the duty of the federal court to hold a hearing in order, as this Court stated, to "find whether the facts alleged are true and whether they can be explained so far as to leave the state proceeding undisturbed" (261 U. S. at 92).

Art. 76, Uniform Code of Military Justice, 64 Stat. 132 (50 U. S. C. (Supp. V) 663).[33] Thus if traditional principles of court-martial review are to be expanded, there is no apparent reason why the doctrines governing the reviewability by habeas corpus in federal courts of judgments of state courts should be inapplicable to similar reviews of judgments of courts-martial.

The difference in degree of direct appellate review available to a person collaterally attacking a judgment of a state tribunal and to one similarly challenging a judgment of a military court is not substantial enough to warrant a difference in treatment. Military appellate review is now equivalent to that of the state judicial systems. See *supra*, pp. 53–57. And the fact that a person in state custody has opportunity, which is unavailable to one in military custody, for review of his conviction by this Court, prior to petitioning a federal district court for a writ of habeas corpus, does not call for any disparity in the action to be taken by the district court. For this Court rarely grants such a petition and may deny it on grounds unrelated to its merits; and in any case the review offered is solely of the state record and there is no new evidence. Moreover, one applying for federal habeas corpus to review a judgment of a state court may have less chance of an additional hearing on the merits,

[33] See fn. 24, *supra*, p. 57.

for, if this Court denies him certiorari, the District Court will on that ground, as a rule, deny his petition for habeas corpus without a hearing, even though the fact of refusal of certiorari has not resolved any issues on the merits. Cf. *Darr* v. *Burford*, 339 U. S. 200, 215–216, and cases cited *supra*, pp. 59–60. The truth is, as the court below pointed out (R. 30), "due process of law is not a fixed formula of unchanging and unchangeable elements. Due process of law in the armed forces has always been in some respects different from due process under civil authority" (see *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *French* v. *Weeks*, 259 U. S. 326, 335; *United States* v. *Hiatt*, 141 F. 2d 664, 666 (C. A. 3)), and it is as just and fair to abide by the decisions of the military reviewers in the case of court-martial prisoners as it is to accept the findings of state tribunals where state defendants are concerned.

Of course, where state courts are unable to grant a remedy—if one should be had—because the state judicial system is inadequate or through bias or other basic defect, the federal district court will not adopt the state's conclusions. See *Ex parte Hawk*, 321 U. S. 114, and the other cases cited *supra*, pp. 59–60. We assume the rule is the same for court-martial proceedings, but there is no occasion to invoke it here. The appellate and corrective processes within the Air Force and executive branch[34] were plainly adequate in

[34] The President confirmed both sentences (*supra*, p. 23).

structure and powers. Reviews of the court-martial records, and the contentions raised by petitioners on the basis of that record, were made by the Staff Judge Advocate, the Board of Review, the Judicial Council, The Judge Advocate General, and, presumably, the President. Consideration of the claims based on matters dehors the record was entrusted to the Judicial Council and The Judge Advocate General (particularly on the petitions for new trial). Extensive opinions were written by each of these military agencies, and it is clear that they considered all the issues now sought to be tried in the District Court.

The new trial procedure is of particular importance. Under former Article of War 53 (10 U. S. C. (Supp. II) 1525), and its successors under the Uniform Code (Arts. 73 and 74, 50 U. S. C. (Supp. V) 660 and 661, and sec. 12 of the Act of May 5, 1950, 64 Stat. 147, 50 U. S. C. (Supp. V) 740), Congress has made broad provision for post-conviction hearings for the correction of errors and redress of wrongs committed in court-martial proceedings. That such procedure may not in all respects accord with that in civil cases is not a valid objection. The fundamental fairness of military proceedings is not to be judged by standards imposed by civil law. Cf. *United States* v. *Fletcher*, 148 U. S. 84; *Martin* v. *Mott*, 12 Wheat. 19. The provisions relating to courts-martial are not violative of the due

process clause of the Constitution just because they differ in form from civil procedures (*Ex Parte Quirin,* 317 U. S. 1; *Reilly* v. *Pescor,* 156 F. 2d 632, 635 (C. A. 8)), certiorari denied, 329 U. S. 790, and it has been judicially said that the correction of errors provided under Article of War 53 "is much better adapted to reach justice than any within the power of the district court on habeas corpus." *Whelchel* v. *McDonald,* 176 F. 2d 260, 263 (C. A. 5), affirmed, 340 U. S. 122.[35]. Cf. Winship, *Court-Martial Procedure Compared with Criminal Procedure in Civil Courts* (1932), 1 Fed. Bar. J. No. 2, 3, 9–14.

During the new trial proceedings, petitioners were represented by counsel who was heard on

---

[35] We have been advised by the Offices of the Judge Advocates General of the Army and the Air Force that during the period from February 1, 1949, to July 10, 1950, 389 applications under Article of War 53 had been received by them, and that 284 had been acted upon during that period. Relief was granted in 33 cases. From January 1, 1945, up to May 1, 1950, habeas corpus relief had been sought by at least 324 military prisoners of which number only one had been finally granted. See Wurfel, *Military Habeas Corpus: II,* (1951) 49 Mich. L. Rev. 699, 709. Thus, more than 11 per centum relief had been granted by Article of War 53 as against one-third of one per centum relief by habeas corpus over a much longer period. A current report from the Office of the Judge Advocate General of the United States Air Force states that during the period from March 1, 1949 to January 27, 1953, that office had received 442 applications for relief under Article of War 53, of which number 436 cases have been finally disposed, with some form of relief having been granted in 43 of those cases.

their behalf; they submitted affidavits and other documents, containing the same allegations as the instruments filed with their habeas corpus petitions.[36] The Judge Advocate General, who had previously had the same matters investigated by the Inspector General's Office, had a special board of officers re-examine the same matters after hearing petitioners' counsel. We submit that such a procedure accords fully with concepts of fundamental fairness, and peitioners cannot validly claim that the scope of the military remedy, properly administered, is inadequate or ineffective. If the personnel of the military reviewing authorities were so biased as to make the military system constitutionally inadequate to redress, in accordance with due process, the particular wrongs complained of here, it was incumbent upon petitioners so to allege in their petitions for habeas corpus, and to sustain the burden of detailed allegation and proof in that respect. *Darr* v. *Burford*, 339 U. S. 200, 218; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1); *Schechtman* v. *Foster*, 172 F. 2d 339, 342 (C. A. 2), certiorari denied, 339 U. S. 924. This they have not done or sought to do. They have not alleged any irregularities or defects in the military appellate processes invoked by them, and

[36] A more detailed description of the new trial procedure is set forth in the Brief for Respondent in *Gusik* v. *Schilder*, 340 U. S. 128, Oct. Term, 1950, No. 110, at pp. 7–12.

none appear on the face of the military record.

In sum, petitioners were given full opportunity to, and did, tender before the military appellate authorities, and in a proceeding for a new trial, exactly the same issues raised in their habeas corpus petitions. *United States* v. *Dennis,* 4 CMR (AF) 872, esp. 888, 904–907; *United States* v. *Burns,* 4 CMR (AF) 907, esp. 923, 927–930; Resp. Exh. (Dennis) G, Appendix B, *infra,* pp. 89–109, Resp. Exh. (Burns) G, Appendix C, *infra,* pp. 110–131. Petitioners do not claim that the appellate authorities failed fully and fairly to consider all of their evidence relative to the various issues, or in any way denied them due process in the course of their appeals. Petitioners have been accorded the full measure of their rights and cannot relitigate on collateral attack issues fairly decided against them on the basis of substantial evidence. The habeas corpus court could and should, in the proper exercise of its discretion based on the military record before it, adopt or accept the military findings without an additional hearing. Cf. *Whelchel* v. *McDonald,* 340 U. S. 122; *Darr* v. *Burford,* 339 U. S. 200; *Ex Parte Hawk,* 321 U. S. 114; *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13; *Frank* v. *Mangum,* 237 U. S. 309; *Schechtman* v. *Foster,* 172 F. 2d 339 (C. A. 2), certiorari denied, 339 U. S. 924.

B. The Court of Appeals did not content itself with summarily accepting the military findings,

but made a careful review of the materials pertaining to each of petitioners' charges (R. 35–43).[37] Rather than duplicate this survey, we shall collate and summarize the facts and circumstances shown by the military record which confirm the correctness of the decision of the courts below to accept the determinations made by the military tribunals.

1. *Confessions.*—The admissibility of Herman Dennis' confessions was thoroughly considered at each stage of the military proceedings. His charges of threats, etc. were denied under oath by the persons involved, and they swore that he was adequately advised of his rights. At the trial, he specifically denied being beaten (Resp. Ex. (Dennis) D, p. 15; 4 CMR (AF) at 895–896), and it was not until much later that he first made that claim; no satisfactory explanation has been offered for the belated change of position. Moreover, the confessions accord with the physical evidence (hairs, smock) and the testimony of others (*supra,* pp. 7–8). In these circumstances, as stated above (*supra,* pp. 59–60), there is no occasion whatever for the civil courts to retry the issue.[38]

2. *Detention.*—Apart from Herman Dennis' treatment during detention, which is discussed immediately above, petitioners' claim appears to

---

[37] Judge Bazelon's review led him to dissent (R. 44–56).

[38] As for Calvin Dennis's confession and retraction, see *supra*, p. 66.

be simply that prolonged detention vitiates the courts-martial. But even if a *McNabb*-type rule were applicable to courts-martial, petitioners could not complain. For their detention before the confessions was not in violation of military law. There is no provision for bail in military law and confinement during investigation is common in serious cases. Article of War 46, 10 U. S. C. (Supp. II) 1517, (former Article of War 70), providing for pre-trial investigation, contemplates detention of at least eight days' duration as entirely lawful, for it provides for forwarding of charges to higher authority within eight days, "if practicable," after the accused is arrested or confined. The confessions here in issue were obtained within five days of detention, and any subsequent confinement, even if unlawful, would not bear on the admissibility of the confessions. Cf. *United States* v. *Mitchell*, 322 U. S. 65; *Carignan* v. *United States*, 342 U. S. 36.

Moreover, as we have already pointed out (*supra*, p. 61), the rule of *McNabb* v. *United States*, 318 U. S. 332, does not apply to military tribunals and there never has been a comparable rule in military proceedings. *Richardson* v. *Zuppann*, 81 F. Supp. 809, 813–14 (M. D. Pa), affirmed on the opinion below, 174 F. 2d 829 (C. A. 3). See also, for a more extensive discussion, the Brief for the United States in *United States* v. *Bayer*, 331 U. S. 532, Oct. Term, 1946, No. 606, at pp. 34–56. Petitioners rely on para-

graph 124 of the 1949 Manual for Courts-Martial, which refers to "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States," but the same sentence adds that such rules are applicable only "so far as not otherwise prescribed in this manual." And paragraph 127, relied on by the Judicial Council (4 CMR (AF) at 900), deals comprehensively with confessions, carefully delineating those which are admissible and those which are not, but without mentioning or suggesting the *McNabb* rule or an equivalent. As for the provisions of the Guam Penal Code providing for speedy arraignment, the Judicial Council and The Judge Advocate General have determined that these provisions do not apply to military personnel detained by the Guam authorities (Resp. Ex (Dennis) D, p. 21; G, p. 7; 4 CMR (AF) 900; Appendix B, infra, p. 100).[39] Whether or not this is so, violation of the Guam Code would not affect the Courts-martial for this Court's decisions on state convictions (*supra*, p. 61) show that mere prolonged detention would not by itself constitute a violation of due process or a deprivation of the essentials of a fair trial.

[39] Chapter 35 of the *Civil Regulations with the Force and Effect of Law in Guam* (Codes of Guam, U. S. Govt. Printing Office, 1947), *infra*, p. 88, in effect at the time of petitioners' arrest, provided for the temporary detention of American military personnel pending delivery to military authorities. With respect to military personnel, Chapter 35 operated in lieu of the sections of the Guam Penal Code applicable to other offenders.

3. *Counsel.*—Each of Herman Dennis's assigned counsel admittedly had at least a month to prepare for trial, and one of them was previously quite familiar with the case, having served during the pretrial investigation (*supra,* p. 13). At the trial, petitioner expressed himself as satisfied with their selection. No question is now raised as to their competence, zeal, or fidelity to duty. Petitioner's desire for Lt. Col. Daly's services was not satisfied,[40] but it is to be noted that Daly was under very serious charges of misconduct and had submitted his resignation "for the good of the service" three weeks before the trial (*supra,* pp. 14, 20). A special investigation ordered by The Judge Advocate General later confirmed the propriety of the decision that Daly was unavailable. (Resp. Ex. (Dennis) G, pp. 10–12; Appendix B, infra, pp. 105–108.) There is certainly no basis for claiming an abuse of discretion. Cf. *Altmayer* v. *Sanford,* 148 F. 2d 161, 162 (C. A. 5); *Hiatt* v. *Smith,* 170 F. 2d 61, 64 (C. A. 3), reversed on other grounds, 336 U. S. 695.

Burns cannot complain of his deliberately selected counsel (Captain Drucker), nor can that counsel be said to have had insufficient time to prepare a defense in view of the facts that no

[40] Petitioner Dennis had written on April 19, after the final statement that Daly was unavailable, that in view of the fact that Daly was under charges he no longer desired Daly's services, but he nevertheless made the request, at the opening of the trial, without so informing the assigned counsel prior to that day (*supra,* pp. 13–14).

adjournment was requested and that the associate counsel were thoroughly familiar with the case, having been formally appointed over a month previously (*supra, pp.* 12–13, 17–18). Cf. *Morton* v. *Welch,* 162 F. 2d 840 (C. A. 6); *Setser* v. *Welch,* 159 F. 2d 703 (C. A. 4), certiorari denied, 331 U. S. 840.[41]

4. *Alleged suppression of evidence, subornation of perjury, etc.*—These charges, as we have noted, were the subject of a special, independent investigation made by the Inspector General's Office. The Judge Advocate General twice examined the reports of this special comprehensive investigation and twice concluded that the charges were baseless. *Supra,* pp. 22, 25–27; Appendix B, *infra,* pp. 103, 108, 109, C, *infra,* pp. 126, 129–131. The petitioners' affidavits do not indicate either that prosecution counsel were aware of these matters or that the defense was unaware of them. Nor do they give any explanation for the affiants' failure to call these matters to the attention of the defense or of the proper military authorities at the time they occurred. And even aside from these significant factors, the affiants' statements are not of the calibre—

[41] On the basis of Chaplain Grimmett's own affidavit, and the official letter attached thereto, one must conclude that there is no ground whatever for the half-charge that the military authorities interfered with petitioners' attempt to get counsel by curtailing the collection of funds. It is evident that the effort was simply to see that the funds were collected in a regular manner and that there was no coercion to contribute.

in specificity, consistency, or factual grounding—which would call upon the court to reject the inquiry conducted by the Air Force and to substitute one of its own. Moreover, the allegations as to attempted subornation of perjury by prosecution investigators, if true, could hardly have injured petitioner Dennis since no evidence alleged to be perjured was used against him, and the charges of intimidation must face the fact that several airmen did testify for the defense (*supra,* pp. 15, 17).[42] Burns' charge that Calvin Dennis perjured himself at the Burns trial was fully considered at that time and during the course of review (Resp. Ex. (Burns) D, p. 5, 4 CRM (AF) 907, 926; Resp. Ex. (Burns) G, pp. 7–10, Appendix C, *infra,* pp. 121–126.

5. *Alleged atmosphere of terror.*—As already noted (*supra,* pp. 27–28), the sufficient answer to the charge that the courts-martial met in an atmosphere of terror and hysteria are the facts that the members were officers from distant stations, and not subject to mob pressure since Guam was under military control. The court below also points out (R. 40) that they "frequently and intensively questioned witnesses for the prosecution."

---

[42] The allegation that specimens of Herman Dennis' hair were "planted" as evidence against him is wholly unsupported by petitioners' affidavits and was rejected, after consideration, by the military reviewing authorities. *Supra,* pp. 25–27; Appendix B, *infra,* pp. 108–109.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

WALTER J. CUMMINGS, Jr.,
Solicitor General.
CHARLES B. MURRAY,
Assistant Attorney General.
OSCAR H. DAVIS,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.
WALTER KIECHEL, Jr., Lt. Col., U. S. A. F.,
Office of the Judge Advocate General,
United States Air Force,
Of Counsel.

JANUARY 1953.

APPENDIX A

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

Art 47 [10 U. S. C. (Supp. II) 1518].

(c) *Action on record of trial.*

Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

Art. 48 [10 U. S. C. (Supp. II) 1519].

Confirmation.

In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

a. By the President with respect to any sentence—(1) of death, * * *

Art. 49 [10 U. S. C. (Supp. II) 1520].

Powers incident to power to confirm.

The power to confirm the sentence of a court-martial shall be held to include—

a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense:

b. The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

d. The power to order the sentence to be carried into execution;

e. The power to remand the case for a rehearing under the provisions of article 52.

Art 50 [10 U. S. C. (Supp. II) 1521].

(d) *Action by Board of Review when approval by President or confirming action is required.*

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Ju-

dicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

* * * * *

(h). *Finality of court-martial judgments.* The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

Art. 53 [10 U. S. C. (Supp. II) 1525]. *Petition for new trial.*

Under such regulations as the President may prescribe, the Judge Advocate Gen-

eral is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Art. 92 [10 U. S. C. (1946 ed.) 1564]. *Murder; rape.*

Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Chapter 35 of the Civil Regulations With the Force and Effect of Law in Guam (Codes of Guam, U. S. Government Printing Office, 1947) provides:

Civil Arrest of Military Personnel

1. Whenever a member of the military forces of the United States is arrested by civil authorities, the offender shall be taken to the police station where the charge shall be investigated. If the charge is considered substantial, he may then be released upon his own cognizance or turned over to military authorities. Should the chief of police consider the charge of a sufficiently serious nature so that special action is necessary or that the release of the offender would be detrimental to his own or the public welfare, the offender may be held pending action on the report of the chief of police to military authority.

2. The chief of police will within 24 hours of the arrest, forward a report to the commanding officer of the offender and will set forth therein the offense alleged, such details as may be necessary to permit the commanding officer to take intelligent action on the case, and the names of such witnesses as may be available. He will also forward one copy of this report to the office of the Governor, for file.

APPENDIX B

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

ACTION UPON APPLICATION FOR RELIEF UNDER SECTION 12, ACT OF 5 MAY 1950

The application of Private Herman P. Dennis, Jr., AF 18 101 483, formerly of the 12th Ammunition Squadron, APO 264, for relief as provided by Section 12, Act of 5 May 1950 (formerly Article of War 53) in relation to his trial by court-martial (ACM 1892), submitted to me by petition, is *denied.*

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

Dated: 28 January 1952.

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

28 January 1952.

AFCJA-34/ACM 1892
Memorandum Opinion
Subject: Petition of Private Herman P. Dennis, Jr., AF 18 101 483, formerly of the 12th Am-

munition Squadron, APO 264, for Relief under Section 12, Act of 5 May 1950 (formerly Article of War 53)

1. The accused was tried by general court-martial at Headquarters, Twentieth Air Force, APO 234, from 9 to 16 May 1949, and was found guilty of rape (specification 1) and premeditated murder (specification 2) in violation of Article of War 92. He was sentenced to be put to death in such manner as the proper authority might direct, all members of the court present at the time the vote was taken concurring. The sentence was approved by the reviewing authority and upon appellate review the Board of Review and the Judicial Council expressed opinions in writing that the record of trial in this case was legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. As The Judge Advocate General, I concurred in these opinions and recommended that the sentence be confirmed and carried into execution. On 3 August 1951 the sentence was confirmed by the President pursuant to the provisions of Article of War 48, and was ordered to be carried into execution.

2. A detailed statement of the facts appearing in the record of trial in this case is contained in the opinion of the Board of Review (29 November 1949) and in that of the Judicial Council (18 July 1950) in ACM 1892, *Herman P. Dennis, Jr.*, 4 Court-Martial Reports (AF) 872.

On the evening of 11 December 1948 Miss Ruth Farnsworth was working alone in the Jade Shop, a retail civilian establishment located on Dadero

Road, Route 1, between the Ammunition Depot area and North Field, on the island of Guam. At about 8:30 p. m. the lights in the shop were extinguished, although ordinarily the shop remained open until 9:00 p. m. At about 10:00 p. m. Mr. John Arnold, a business associate of the proprietor of the Jade Shop, who sometimes slept there at night, returned to the shop and parked in front. He noticed that the two front doors of the shop were open, and although the lights were out, the generator outside and in back of the shop which supplied it with light, was still running, and inside he found the shop in disorder. On entering the building, he found an orange-red scarf on the floor, and with the aid of a flashlight, he found a bracelet and pendant watch, all identified as belonging to Miss Farnsworth; and he noticed that the cash drawer seemed to be intact. Not finding any of the female clerks in the building, and suspecting foul play, Mr. Arnold went outside, hailed a passing military patrol and reported the matter. A further investigation with one of the police personnel revealed on the floor of the shop, at about the same place where the other articles were found, several bobby pins, hairpins, a length of rope, and a part of a red lacquered fingernail similar to a portion broken from Miss Farnsworth's finger. The investigation showed further that a show case had been pushed out of place, all indicating that a struggle had occurred. Outside it was discovered that one of the wires connecting the generator with the shop had been disconnected, and truck tire tracks appeared on a secondary road leading up to a

spot near a pig pen about two hundred yards back from the shop in the jungle. Prior to being hailed by Mr. Arnold that evening the patrolmen had driven by the Jade Shop at about 8:20 p. m. and the lights were on, but when they re-passed the shop about 9:00 p. m. the lights were out; and Miss Blackledge, the other clerk in the shop, passing the shop on her way to a dance, at about 8:30 p. m., noticed that the lights were off at that time. When passing the shop at about 8:20 p. m. the patrolmen noticed two customers in the shop with Miss Farnsworth, one dark and tall, and the other shorter, heavier set, and not so dark, resembling respectively petitioner and Staff Sergeant Robert W. Burns, an accomplice who was convicted in a separate trial of the same offenses as was this petitioner. A search for Miss Farnsworth (hereafter called the victim) was organized and the following morning (12 December 1948) one of her sandals was found near the shop. This intensified the search for her until on the morning of 13 December 1948 she was found lying on her back in a small clearing in the jungle (called the boondocks), grievously beaten and abused, still alive but unconscious, dirty, her clothing raised above her hips, and her legs spread wide apart, indicating that she had been the victim of a criminal attack. Taken to the hospital an examination showed that her jaw was fractured and she had been abused to the extent that almost no portion of her body was free of bruises and abrasions. Her fingernails were broken, her vagina had been injured, and she had been choked. She died a few hours after being

taken to the hospital, without gaining consciousness, as a result of brain injuries caused by blows on the face and head, shock, and exposure to the elements. The other sandal was found on 14 December 1948 in the jungle some distance from the shop.

At about 7:45 p. m. on 11 December 1948 petitioner and Burns were observed loitering near a fence a short distance from the Jade Shop; and about 9:45 p. m. a civilian picked up the petitioner on the highway about three-fourths of a mile from the shop. Petitioner, Calvin Dennis, and Robert W. Burns had arrived at the Jade Shop in a truck which was being operated as a shuttle bus between two points on the highway near which the shop was located. Calvin Dennis had been assigned to drive the truck on the night of the crime, and the records which were required to be kept of trips made between the two points, and the time thereof, showed that no trip had been made between approximately 7:30 p. m. and 9:30 p. m. Upon a search of the truck subsequently made there was found in the back of the seat a part of the victim's smock which she had frequently worn at work.

On 7 January 1949 petitioner and his two accomplices were taken into custody. Four separate statements were made by petitioner, two on 11 January 1949, one on 12 January 1949, and one on 13 January 1949. The first two of these statements were wholly in the handwriting of petitioner and the remaining two were in question and answer form. In these statements petitioner told in detail how he, with Robert W. Burns and Calvin Dennis, had gone to the Jade Shop on the

night in question; that when he saw Burns strike the victim, he ran out of the shop and disconnected the generator; that he then returned to the shop, picked up the girl, and accompanied by Burns and Calvin Dennis, took her into the jungle. There she was laid down and stripped, and petitioner stated he had intercourse with her three times, following which he left the scene alone and from the highway caught a ride back to North Field, where he got out and returned to his squadron on foot. Hairs and fibres taken from the rope were identical with hair taken from the head of the victim and fibres from her sweater and dress. Hairs found upon the smock were identical with pubic hair taken from petitioner. The blankets taken from the truck contained hair similar in characteristics to that of the victim and of petitioner, and also red wool fibres similar to those from the victim's sweater. A hair similar to that of the victim was taken from petitioner's shirt. On 12 January 1949 petitioner re-enacted his part in the crime, at the Jade Shop, and he pointed out the trail in the jungle in the vicinity where the sandals (or slippers) of the victim were found.

Witnesses testified for the defense that they had seen petitioner at the post theater variously between the hours of 7:30 p. m. and 9:30 p. m., and about rags kept in the truck for use in washing it. Petitioner testified as to attending the movie theater between 7:45 p. m. and 9:30 p. m. on the night of 11 December 1949. Petitioner also testified for the limited purpose of showing the manner in which the statements were taken

and to show that they were involuntarily given and extracted by the use of coercive tactics, promises, and threats.

3. By the petition subscribed 31 August 1951 by his attorney in fact, the petitioner requests any and all relief afforded by Section 12, Act of 5 May 1950 (formerly Article of War 53). In support of the petition there are appended an affidavit of petitioner that Calvin Dennis is not his brother, half-brother, or in any way related to him; a further affidavit of petitioner detailing threats, promises, and duress alleged to have been used against him; two affidavits of Mr. Edward F. Daly and one of Miss Mary Louise Hill; an affidavit of Calvin Dennis which is in general effect a retraction of his testimony at the trial of his accomplice Robert W. Burns; a memorandum in support of the petition containing a motion for a new trial; and a copy of the memorandum of counsel submitted to the Judicial Council under date of 16 June 1950 for consideration by its members. All of these various affidavits, briefs, and attachments to the petition have been considered, and will be made the subject of later discussion.

Counsel for petitioner requested an oral hearing to present argument on the petition, which was had on 30 October 1951 before a board of officers appointed by me to hear argument, consider all evidence and make a recommendation to me as to appropriate action to be taken on the petition. At this oral hearing counsel for petitioner treated the instant case and the two involving separate trials of the accomplices as a group and presented argument on five points, con-

sidered to be applicable to all three cases for convenience of joint discussion, as follows: The rights of accused at the time they were taken into custody on 7 January 1949; the rights of accused with regard to the admission by the court of confessions and other evidence, at the time of the court-martial, which in this case began 9 May 1949; a consideration of the affidavits of Calvin Dennis stating that his testimony at the trial of Robert W. Burns was false and was prompted by the promise of a light sentence; a consideration of the affidavits of Mr. Daly and Miss Hil' as tending to support the theory of the involuntary nature of the confessions of petitioner and Calvin Dennis, and reflecting upon the method of conducting the trial; and certain statements in the record claimed to be prejudicial—(a) that repeated reference was made at the trials that petitioner and Calvin Dennis, tried separately for the same offenses, were brothers, and (b) statements by the witness Sue I. Blackledge at the trial in the instant case about expressions by petitioner to her of abhorrence of racial segregation, unhappiness in the South and his desire to take her picture. These points will be separately discussed hereafter in this opinion in connection with others made obvious by the petition.

4. Statements of the facts contained in the record of trial appear in the opinions of the Board of Review and the Judicial Council in complete form, and in such detail that I consider it appropriate for purposes of this petition to present only a brief summation of such facts; and as such facts are not now in actual dispute,

but only certain contentions based on some of such facts, I shall limit this discussion to the confines of the actual matters raised by the petition, and at the oral hearing.

In the memorandum in support of the petition counsel point to the lack of authority of the Judicial Council to have considered matters *aliunde* the record, and then point out that reference in his confessions by petitioner concerning Calvin Dennis being his brother raises more than a reasonable doubt as to the genuineness of the confession. The memorandum then refers to the brief submitted to the Judicial Council and states:

> This brief places the attached affidavits in their proper perspective, thereby underlining the injustices which they indicate.

This brief (before Judicial Council) discusses some of the evidence, such as the failure of the expert witnesses to point out sufficient characteristics from the hair analyses to identify it as associated with any particular person (pages 3–4); and the lack of meaning attachable to the presence of petitioner near the vicinity of the Jade Shop on the day of the crime (page 5). Aside from these matters, however, the real gist of the entire brief is that the conviction cannot stand because of petitioner's fundamental rights to be held only under legal process, to have counsel from the moment of incarceration, and not to be convicted by use of an involuntary confession, have been violated (page 2).

Thus, considering the petition and its supporting memorandum and all the matters incorporated therein by reference, and the points urged

at the oral hearing, the grounds assigned as good cause for the relief sought narrow down to those which follow, each of which will be discussed separately herein.

First: What was the legal status of petitioner at the time of his arrest and detention by the United States naval authorities on Guam on 7 January 1949?

At the oral hearing counsel for the petitioner argued that at the time of the arrest Guam was under the control of the United States acting through the Department of the Navy, officials of which department arrested petitioner and held him "incommunicado" until 12 January 1949, at which time he had signed confessions. Counsel contended that even though Guamanians are not citizens of the United States and the Constitution of United States does not apply to them, yet when the government of the United States operates in a civilian capacity, a citizen of the United States must be afforded at all times his constitutional rights; that at the time of petitioner's arrest the Department of the Navy had no jurisdiction over him, but only the Air Force, so that the arrest by the naval authorities was in the nature of a civil arrest because the naval authorities were acting on behalf of the civil government in Guam, not the military; that the Penal Code of Guam in force in January 1949 (Section 686) contained provisions for a speedy and public trial, provided for the right to counsel and the right of an accused to be informed of the nature of his offense, and contained a provision against self-incrimination (also provided for in Section 780c); that such Penal Code (Section 825) also

provides that an accused must be taken before the judge (magistrate) within 24 hours after his arrest, and provides (Section 1473) that the writ of habeas corpus cannot be issued as to any person in the military or naval service of the United States without the consent of the Governor of Guam after complying with certain procedures (Chapter 35, Civil Regulations—Civil Arrest of Military Personnel). From this counsel argued that at the very least petitioner was entitled to the protection of the Penal Code of Guam, meaning, as he contends, that when petitioner was arrested he had a right to be brought before a magistrate within 24 hours and be charged with a specific crime and to be advised by counsel of his rights against self-incrimination before he signed the confessions; and that since the civilian government violated its duties to these men, the Air Force participated in those illegal violations of rights under the Guam Code and the Constitution of United States, and therefore could not use the confessions thus illegally obtained to secure conviction. Counsel concluded that since it was shown that petitioner was "held in actual isolation" and was permitted contact with no one except the interrogating authorities, it follows that due process was not accorded because of the manner in which petitioner was "held, questioned, and not permitted to have advice or counsel."

The arguments of counsel on this point have been set forth at some length to introduce this statement that these contentions were presented by counsel in substantially the same form to the Judicial Council in this case, and the discussion of the point and the legal points raised by that

body in its consideration of the case have pertinence here in view of counsel's prior presentation. The Judicial Council held in this case, and I think rightly, that the accused did not have, and therefore was not deprived of, any right to a preliminary hearing before a committing magistrate or any other like authority, and stated:

> There is no provision for such preliminary hearing or arraignment in military law and accused had no such right under the laws of Guam, a military government deriving its authority from the United States and administered by the Department of the Navy. It should be observed that the accused was arrested under the authority of the military government of Guam and held under such authority until after the statements in issue had been made. Chapter 35, "Civil Regulations With the Force and Effect of Law in Guam" (United States Government Printing Office, 1947) provides for the detention of United States military personnel and with respect to such personnel, operates in lieu of Sections 825 and 847–849, Penal Code of Guam, which is applicable to other offenders.

I consider this statement of the law to be correct, and although the discussion occurred in connection with consideration of the evidentiary excluding rule announced in decisions of the United States Supreme Court (*McNabb* v. *United States*, 318 U. S. 332, and *Upshaw* v. *United States*, 335 U. S. 410) and was thus limited to the question of an accused's right to be brought promptly before a committing magistrate for a preliminary examination, in principle it meets with exactness and is dispositive of the arguments advanced for

petitioner in this case; and especially so when considered in the light of the considerable volume of evidence showing that petitioner was fully and explicitly warned of his testimonial rights and that the confessions were made voluntarily and were admissible within all rules applicable to the administration of military justice.

Second: What was the legal status of petitioner at the time of his court-martial beginning 9 May 1949 with regard to the admission in evidence of his confessions made 11, 12, and 13 January 1949?

This point comes as a corollary to the "First," and it is urged that since petitioner was denied rights accruing to him under the Code of Guam, *a fortiori*, the confessions extracted in violation of such rights were inadmissible, and hence a conviction based thereon cannot stand. I have pointed out the reasons why I consider the provisions of the Code of Guam to be inapplicable as creating or affecting the rights urged on behalf of petitioner. But, in addition, the argument loses force when it is considered that the four statements made by petitioner while he was being detained by the Guam authorities were received in evidence after presentation to the court of much evidence with respect to the voluntary nature of these confessions, including petitioner's own sworn testimony as a witness in his own behalf, and his denial that physical force was used against him. The conflict of evidence in this connection was presented to the court, and was resolved against petitioner. Thus, the issue of whether the statements were obtained by force

and duress, and without advice as to his rights, and whether they were voluntary, was raised, considered, and decided at the trial. The evidence as a whole, bearing upon the voluntary nature of the four statements of petitioner, presented a question of fact for the court, and it is my opinion that the court properly resolved the issue. After reading and re-reading the record of trial, there is no reasonable doubt in my mind that all the confessions were wholly voluntary, as the court decided, and were properly admitted. Where the evidence as to whether there was coercion is conflicting, or where different inferences may fairly be drawn from the admitted facts, the question whether a confession was voluntary is for the triers of the facts (*Lyons* v. *Oklahoma*, 322 U. S. 596; *Lisenba* v. *California*, 314 U. S. 219). Thus the court's decision on the voluntary nature of the testimony, arrived at from first-hand hearing and observation, is presumptively correct and will not be disturbed unless manifestly erroneous (*MGM Corporation* v. *Fgar*, 104 F. 2d 892; ACM 3597, *Maddle*, 4 Court-Martial Reports [AF] 573).

Third: Consideration of the affidavits of Calvin Dennis that his testimony at the trial of Robert W. Burns was false and was prompted by the promise of a light sentence.

This point has no application to this petitioner; it is in connection with the petition of Robert W. Burns that it has pertinence.

Fourth: Consideration of the affidavits of Mr. Edward F. Daly and Miss Mary Louise Hill as tending to support the theory of the involuntary

nature of petitioner's confessions, and as reflecting upon the method of conducting the trial.

Counsel argued that the mentioned affidavits support the allegations that petitioner makes with regard to the involuntary nature of his confessions, and in addition, cast serious doubts upon the propriety of these proceedings in Guam. This argument, insofar as it touches upon the question of whether the confessions were voluntary, has been met in the discussion occurring under "First" and "Second" and any further discussion would be repetitious. Insofar as this point touches upon the charges contained in the affidavits of Mr. Daly and Miss Hill regarding the method of conducting the trial, it should be noted that Mr. Daly alone makes the assertions contained in his affidavits, and no further substantiation of these allegations has been presented. Further, the various allegations and charges of Mr. Daly as set forth in his affidavits, and the various statements of Miss Hill, were made the subject of an exhaustive investigation by the Directorate of Special Investigation, Office of the Inspector General, United States Air Force, both from the standpoint of the charges made and the motives for making them. I have again reviewed the results of this investigation and I can arrive at no different conclusion than that previously reached that the charges are unfounded.

Fifth: Prejudicial statements in the record.

(a) It is contended by counsel that it was made to appear to the court that petitioner and Calvin Dennis were brothers. Affidavits of petitioner and Calvin Dennis to the contrary have been submitted. In three of his confessions peti-

tioner refers to Calvin Dennis as "my brother Calvin." Counsel argues that such reference to blood relationship might have caused the court, in weighing the truth of the confessions, to attach more weight and credibility to such evidence than if the two men had appeared to be unrelated. It is impossible to determine at this juncture whether the court would believe that a man making statements implicating his own brother would be impelled by higher motives of truth than an accomplice not so related, or whether, contrariwise, the court would suspect ulterior design, and attach less credibility to such statements. But such a determination involves conjecture and speculation of a high order, in which I am not required to indulge, because any conclusion reached by such a process could have no value in determining the weight of the evidence. The court must be presumed to have taken into consideration all matters affecting the testimony of witnesses when weighing the evidence, prior to making its findings (*Larsen* v. *Portland S. S. Company,* 66 F. 2d 326, 329) and I will not attempt to speculate in retrospect that the decision of the trial court on the credibility of witnesses could have been affected by evidence so intangible as that urged (*MGM Corporation* v. *Fear,* 104 F. 2d 892). Clear and convincing proof is required to set aside the judgment of a general court-martial, and matters of claimed injustice must be sustained "not as a matter of speculation but as a demonstrable reality" (*Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 281).

(b) It is also contended that the decision of the court was affected by certain testimony of the witness Miss Blackledge (Record of Trial, page 77), to the effect that petitioner had stated to the witness his feeling of unhappiness at segregation, his unhappiness in the South, and his desire to take her picture. Counsel argue that this evidence was calculated to prejudice the court, and was not offered to prove premeditation, malice aforethough, or a particular frame of mind. The Manual provides (Manual for Courts-Martial, 1949, par. 140):

> In others, such as murder, a particular frame of mind must be proved—premeditation in the case of murder punishable by death—malice aforethought in all cases of murder. In those cases the specific intent or frame of mind may be established either by independent evidence, as, for example, words proved to have been used by the offender, or by circumstantial evidence, as by inference from the act itself.

It would appear that this evidence was properly admitted as a circumstance tending to show petitioner's feeling toward women, and his previous desires for female companionship. The record does not show that the evidence was introduced into the trial merely to prejudice the court, as is contended.

Sixth: Petitioner was denied counsel of his choice.

Statements appear in the affidavit of Mr. Daly (October 1949) that raise the point that petitioner was denied counsel of his choice. This entire matter was the subject of a most thorough dis-

cussion in the opinion of the Judicial Council, with which I concur, and which makes it unnecessary to elaborate here. Further, the independent investigation heretofore referred to disproves these contentions. The fact that Mr. Daly appeared as a witness during the trial, once for the prosecution and once for the defense, in addition to his connection with the case prior to the trial, as indicated by his testimony, both show definitely that a definite impropriety might have been involved had he appeared on behalf of petitioner. But the investigation further proved to my satisfaction that the Commanding Generals were entirely within their prerogative as enunciated by paragraph 45a, Manual for Courts-Martial, USAF, 1949, in declaring as not available the counsel chosen by petitioner, former Lieutenant Colonel Edward F. Daly, and that they did not have ulterior motives, as is intimated, in declaring him (Daly) unavailable. At the outset of the trial petitioner stated he desired to be represented by the regularly appointed defense counsel "but do wish to have Lieutenant Colonel Edward F. Daly to assist." The prosecution then explained to the court that Colonel Daly had been declared unavailable as military counsel for accused by the appointing authority, to which defense counsel responded (Record of Trial, page 4):

> However, I am aware that Colonel Daly is in a status which makes the stand of the prosecution and the Commanding General, Twentieth Air Force, proper.

It was then shown by amendment of orders that Lieutenant Colonel Adrian W. Tolen would act

as defense counsel and First Lieutenant Ensley as assistant defense counsel. After a motion for severance had been sustained by the court, and the court had decided that it would proceed with the instant case, and after a recess, the accused stated:

> I still want Captain Katz as Assistant to Colonel Tolen and Lieutenant Ensley,

with the result that in view of accused's specific request, the court directed that Captain Katz "should remain as a part of the defense."

Without regard to the legal rule that the determination of the availability of qualified defense counsel within the meaning of Article of War 11 is a matter exclusively within the discretion of the appointing authority whose determination is final (Manual for Courts-Martial, 1949, par 45a; *Hiatt* v. *Brown*, 339 U. S. 103; ACM 2437, *Quinn*, 3 Court-Martial Reports [AF] 108) or the further rule that petitioner may not complain that he was inadequately represented by his deliberately selected counsel (*Adams* v. *Hiatt*, 79 F. Supp. 433; *Morton* v. *Welch*, 162 F. 2d 840; *Setser* v. *Welch*, 159 F. 2d 703, cert den 67 S Ct 1510), the record shows that capable counsel had been made available to petitioner, that in open court he indicated clearly by whom he wished to be defended, and that throughout the trial he was defended by counsel (three) of his choice. Scrutiny of the record convinces me that petitioner was defended with loyalty, ability, and skill, which perforce attained for him the standards required by concepts of a fundamentally fair trial (*Moss* v. *Hunter*, 167 F. 2d 683; *Altmeyer*

v. *Sanford,* 148 F. 2d 161; *Romero* v. *Squier,* 133 F. 2d 528; *Liner* v. *Cozart,* 80 F. Supp. 540).

Seventh: Important evidence was withheld from the court at the trial.

Finally, it is contended that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was withheld from the court (Daly affidavit, dated 30 August 1951). Here again, this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless. Further, a presumption obtained that a person acting in the capacity of a public officer performed his duties properly (Manual for Courts-Martial, 1949, par. 125a; Manual for Courts-Martial, 1951, par. 138a) and such presumption of regularity may be indulged as to officers charged with the administration of military justice (CM 320618, *Garner,* 70 Board of Review 71; CM 332704, *Bilbo,* 81 Board of Review 185) and as to courts charged with protecting fully the rights of an accused person (*Rudolph* v. *Lockwood,* 2 F. 2d 319; *Johnson* v. *Wilson,* 131 F. 2d 1). Therefore, I hold, there being no clear showing to the contrary, that the officers who investigated this case, prepared and preferred charges and prosecuted the case before the court, were not remiss in the performance of their duties. They were vested with wide discretion in developing and sorting the evidence to be used, and in choosing the witnesses conceived to be necessary to present the case properly, and the order and manner in which the evidence

would be presented. Petitioner attempts to insinuate an element of doubt into the case by intimating that material evidence helpful to the defense was suppressed; but he fails to point out how such evidence was material to his defense, or how it affected or prejudiced him in any way. The force of such a suppositive argument is minimized by my own study of the reports of investigation of these matters, and I hold that in order to avail petitioner anything, such intimations and accusations must be supported by grounds less speculative and abstruse than those presented.

5. As previously stated, I have re-examined the reports of the comprehensive investigations which were conducted at my request, and I have examined the entire records in this and its allied cases, in the light of the grounds set forth in the petition, and I hold that the petition presents no good cause for the relief sought and that no injustice to petitioner is shown.

Therefore, no good cause for relief within the purview of Section 12, Act of 5 May 1950 (formerly Article of War 53) having been shown, the petition will be *denied*.

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

APPENDIX C

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

ACTION UPON APPLICATION FOR RELIEF UNDER SECTION 12, ACT OF 5 MAY 1950

The application of Staff Sergeant Robert W. Burns, AF39341855, formerly of the 12th Ammunition Squadron, APO 264, for relief as provided by Section 12, Act of 5 May 1950 (formerly Article of War 53) in relation to his trial by court-martial (ACM 1893), submitted to me by petition, is *denied*.

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

Dated: 28 January 1952.

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

28 January 1952.

AFCJA-34/ACM 1893
Memorandum Opinion
Subject: Petition of Staff Sergeant Robert W. Burns, AF39341855, formerly of 12th Ammunition Squadron, APO 264, for Relief under

Section 12, Act of 5 May 1950 (formerly Article of War 53)

1. The accused was tried by general court-martial at Headquarters, 19th Bombardment Wing (Medium), APO 334, on 27, 28, and 30 May 1949, and was found guilty of rape (specification 1) and premeditated murder (specification 2) in violation of Article of War 92. He was sentenced to be put to death in such manner as the proper authority might direct, all members of the court present at the time the vote was taken concurring. The sentence was approved by the reviewing authority and upon appellate review the Board of Review and the Judicial Council expressed opinions in writing that the record of trial in this case was legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. As The Judge Advocate General, I concurred in these opinions and recommended that the sentence be confirmed and carried into execution. On 3 August 1951 the sentence was confirmed by the President pursuant to the provisions of Article of War 48 and was ordered to be carried into execution.

2. A detailed statement of the facts appearing in the record of trial in this case is contained in the opinion of the Board of Review (14 March 1950) and that of the Judicial Council (18 August 1950) in ACM 1893, Robert W. Burns, 4 Court-Martial Reports (AF) 907.

On 11 December 1948 Miss Ruth Farnsworth (hereafter referred to as the victim) was employed as a part-time clerk at the Jade Shop,

a civilian store located on Dadero Road, Route 1, near the Marbo Base, and between the Ammunition Depot area and North Field, Island of Guam. At approximately 5:00 p. m. on that day Miss Sue Blackledge, a part-time clerk who worked with the victim at the store, quit work, leaving the victim to tend the store until 9:00 p. m., the usual closing time. At about 10:00 p. m. Mr. John Arnold, a business associate of the owner of the shop who sometimes stayed there at night, drove to the shop and stopped in the parking area in front. Noticing that the lights in the shop were off, although the generator outside and at the rear of the building which furnished light to the shop was running, he went into the shop and found on the floor a woolen, orange-red scarf, and with the aid of a flashlight, a bracelet and pendant watch, all identified as belonging to the victim. Mr. Arnold went outside and hailed a passing military patrol car, reported the matter, and in a further investigation with the military police there were found on the floor of the shop, at about the same place as the other articles were found just previously, several bobby pins, hairpins, a section of rope, and a part of a red lacquered fingernail similar to a portion broken from the victim's finger. The investigation showed further that a show case had been pushed out of place, although previously Mr. Arnold had noticed that the cash register seemed to be intact, and there were some streaks on the floor, all indicating that a struggle had taken place. Outside, Mr. Arnold and a patrolman discovered that one of the wires connecting the generator with the shop had been disconnected, and truck tire

tracks appeared on a secondary road leading up to a spot near a pig pen about 200 yards back in the jungle. Prior to being hailed by Mr. Arnold that evening the patrolmen had driven by the shop about 8:20 p. m., at which time the lights were on, but when they passed the shop again at about 9:00 p. m. the lights were out; and Miss Blackledge, passing the shop on her way to a dance at about 8:30 p. m., noticed that the lights were off at that time. The finding by an investigator of the victim's sandal in the area nearby the shop intensified the search for her until on the morning of 13 December 1948 she was found in a small clearing in the jungle (called the boondocks) four or five hundred yards back of the shop. She was unconscious but still alive, was lying on her back unclothed from waist to toes, with her legs spread wide apart. Her face was bloody and dirty and her body badly bruised and beaten. She was taken to a hospital where a medical examination and a subsequent autopsy disclosed that she had sustained a broken jaw, lacerations and abrasions about the face and hands, bruises and abrasions about the neck which could have been caused by a rope, and abrasions and scratches upon the shoulders, lower abdomen, and pubic regions. Her fingernails were broken, her vagina had been injured, and she had been choked. She died a few hours after being taken to the hospital, without regaining consciousness, as a result of brain injuries caused by blows on the face and head, shock, and exposure to the elements.

Calvin Dennis, one of the accomplices, testified that on the evening of 11 December 1948 he was

on duty driving a shuttle bus running between the Twelfth Ammunition area and North Field; that he, petitioner and Herman P. Dennis, Jr., went in the bus to the Jade Shop about 8:15 p. m.; and that while he was looking at some merchandise he saw petitioner strike the victim with his fist; that the victim screamed and fell to the floor, and Herman Dennis ran out of the shop, following which the lights went out; that he (Calvin) left the shop and returned to the parked truck, meanwhile hearing the girl say "Let go"; that while he was backing the truck to the highway, he saw Herman Dennis leave the shop with the girl in his arms; that he started to drive the truck up a secondary road to turn around and, looking back, he saw petitioner and Herman Dennis throw the victim into the back of the truck; that he drove the truck up the road to a pig pen, and while turning around he saw petitioner and Herman Dennis take the girl off the truck. Calvin Dennis then testified that he returned to his organization, and upon being called on the telephone by petitioner, he picked him up on the 9:30 p. m. run near the North Field gate. Calvin Dennis asked petitioner why he hit the girl, who told him that if he did not stop talking "you will get what she got." Petitioner then pulled out from his shirt a smock, explaining that he had taken it off of the victim, and he stuffed it behind the seat of the truck, where it was later found by an investigator. At that time petitioner stated to Calvin Dennis that he had had intercourse with the victim once or twice.

Other occurrences at about the time of the crime, are significant. At about 9:30 to 10:00

p. m. on 11 December 1948 two members of petitioner's organization, one of whom had been with him earlier in the evening, saw blood on his trousers around the region of the left thigh and below the belt. When inquiry was made petitioner stated he had been "cutting meat." Petitioner's duties as mess sergeant did not include cutting meat, and those who did so wore aprons; and ordinarily no meat would have been cut on that night (Saturday) because fowl was served on Sunday. The morning following the crime petitioner was observed in the mess hall. He appeared to be highly nervous and irritable and in a discussion of the subject of sex petitioner stated to another airman on duty as cook that he had had intercourse and "I got it the wrong way." Of further significance is the circumstance that on the evening of the crime the charge of quarters whose duties included supervising the shuttle bus saw Calvin Dennis make his first run at 7:10 p. m. but did not see him again until approximately 9:00 p. m. Analyses made by experts of scrapings taken from the cab and body of the truck and from blankets found therein, of the rope found inside the shop, and of the sweater, dress, and scarf worn by the victim, reveal hairs and fibres on the rope, the hairs corresponding in characteristics to the head hair of the victim, and the fibres corresponding to those from her sweater and dress; revealed human blood and pubic hairs in the scrapings from the truck; revealed human blood and hairs and fibres having the same characteristics as those from the victim and her clothing; and hair, caucasian and non-

caucasian, was discovered variously on the several materials examined.

Petitioner did not testify at his trial. Evidence was adduced by the defense that between 5:30 p. m. and 6:30 p. m. on the evening in question Calvin Dennis was seen at the Twin Palms Cafe, where he was boisterously arguing with a waitress, and that he had an odor of benzedrine about him. There was also testimony about the condition of the smock, and that the victim had not worn it that evening.

3. By the petition subscribed 31 August 1951 by his attorney in fact, the petitioner requests any and all relief afforded by Section 12, Act of 5 May 1950 (formerly Article of War 53). In support of the petition there are appended to it the following: An affidavit of Calvin Dennis stating that his testimony against petitioner at the trial was untrue, and was perjured because of threats and promises of a light sentence; a further affidavit of Calvin Dennis being in general effect a retraction of his testimony at the trial of petitioner and a repudiation of his own confession because of alleged coercion; copies of two affidavits of Mr. Edward F. Daly and a copy of one of Miss Mary Louise Hill; a memorandum in support of the petition containing a motion for a new trial; and a copy of the memorandum of counsel submitted to the Judicial Council under date of 16 June 1950 for consideration by its members. All of these various affidavits, briefs, and attachments to the petition have been considered, and will be made the subject of later discussion.

Counsel for petitioner requested an oral hearing to present argument on the petition, which was held on 30 October 1951 before a board of officers appointed by me to hear argument, consider all evidence and make a recommendation to me as to the appropriate action to be taken on the petition. At this oral hearing counsel for petitioner treated the instant case and the two cases involving separate trials of the accomplices as a group and presented argument on five points, considered by him to be applicable to all three cases for convenience of joint discussion, as follows: A discussion of the rights of the three airmen at the time they were taken into custody on 7 January 1949; their rights with regard to the admission by the court of confessions and other evidence, at the time their trials began; a consideration of the affidavit of Calvin Dennis stating that his testimony at the trial of petitioner was false and was prompted by the promise of a comparatively light sentence; a consideration of the affidavits of Mr. Edward F. Daly and Miss Mary Louise Hill as tending to support the theory of the involuntary nature of the confessions of Herman P. Dennis and of Calvin Dennis, and the latter's testimony at petitioner's trial, and reflecting upon the method of conducting the trial; and certain statements in the record claimed to be prejudicial—(a) that repeated reference was made at the trials of Calvin Dennis and Herman Dennis, Jr., tried separately for the same offenses, that they were brothers, which may have swayed the court in its estimate of the weight to be attached to the affidavits of Calvin Dennis,

and his testimony in the trial of this petitioner; and (b) that testimony by the witness Sue I. Blackledge in the trial of Herman P. Dennis, Jr., about abhorrence by the latter of racial segregation, unhappiness in the South, and his desire to take her picture, was introduced in order to prejudice the court. These points, where pertinent, will be separately discussed hereafter in this opinion, together with others raised by the petition.

4. Statements of the facts contained in the record of trial appear in the opinions of the Board of Review and the Judicial Council in complete form and in such detail that I consider it appropriate for purposes of this petition to present only a brief summation of such facts; and as such facts are not now in dispute, but only certain contentions based on some of such facts, I shall limit this discussion to the confines of the actual matters raised by the petition, and at the oral hearing.

In paragraph 6 of the petition the following statement appears:

> See attached memorandum as to the facts, rulings, or errors which are relied on as good cause for the remedy sought.

Paragraph 7 then lists the documents and affidavits relied upon to support the application for relief, so that the petition incorporates by reference and adopts the two memoranda, with their supporting affidavits and documents, as the grounds for the relief sought. Hence, the grounds thus set forth and urged as good cause for relief will be examined and stated, in conjunction with those raised at the oral hearing.

In the memorandum in support of the petition counsel review the testimony of fourteen of the twenty-three witnesses at the trial (Calvin Dennis not included) as "corroboratory of Calvin Dennis' testimony" and conclude that such summarizing of the evidence demonstrates that except for the testimony of Calvin Dennis "there is nothing that even remotely implicates petitioner except the blood stains—and his statement that he had had intercourse, but had obtained it the wrong way" (Brief, page 9) and that "without Calvin Dennis' testimony the conviction of petitioner could not stand." Thus the gist of the entire brief is that considering all corroborative evidence apart from the testimony of Calvin Dennis, which falls because he now retracts it and protests his innocence, the prosecution proved only that a crime was committed, without implicating petitioner in its commission.

The memorandum brief before the Judicial Council discusses some of the evidence, such as the failure of the expert witnesses to point out sufficient characteristics from the hair analyses to identify it as associated with any particular person (pages 3–4) and then launches into the real nub of the discussion that the conviction cannot stand because the petitioner's fundamental rights to be held only under legal process, to have counsel from the moment of incarceration, and not to be convicted by the use of an involuntary confession, have been violated (page 2). Thus, except as incidental to the joint discussion, this brief, although included in the petition by reference, has no real bearing on the instant case

because petitioner made no confession and is only remotely affected by the confessions of the others to the limited extent that they implicated him in the crime and resulted in his apprehension.

Thus, considering the petition and the supporting memoranda, all the matters incorporated therein by reference, and the points urged at the oral hearing, the grounds assigned as good cause for the relief sought narrow down to those which follow, each of which will be discussed separately herein.

First: What was the legal status of petitioner at the time of his arrest and detention by the United States naval authorities on Guam on 7 January 1949?

This point has particular reference only to the confessions of Calvin Dennis and Herman P. Dennis, Jr., and the alleged violation in their procurement of rights to counsel, to prompt arraignment and trial, and to protection against self-incrimination. As pointed out, this petitioner made no confession, and consequently the argument on this point has no pertinence to his conviction except that incidentally the confessions of the others gave the necessary clues to effect petitioner's apprehension. It will suffice to state here that this argument regarding the rights of the three men under the Penal Code of Guam after their arrest and detention by the Department of the Navy authorities was made before the Judicial Council, and the opinion and holdings of that body on the legal points raised, in which I concur, appear in ACM 1892, *Herman P. Dennis, Jr.*, 4 Court-Martial Reports (AF) 872. My con-

clusions in the matter also appear in a Memorandum Opinion accompanying my action upon the companion petition for a new trial or other relief filed on behalf of Calvin Dennis.

Second: What was the legal status of this petitioner at the time of his court-martial beginning 27 May 1949 with regard to the admission in evidence of the confessions of his two accomplices in their separate trials.

This point comes as a corollary to the "First." As has already been pointed out, this petitioner made no confession and hence the point has no pertinence to this case. The testimony of Calvin Dennis, who was tried separately and found guilty by a general court-martial of the same offenses as those of which the petitioner was convicted, was the principal evidence upon which the prosecution relied to connect petitioner with the offenses and establish his guilt. The coherence of this testimony, its voluntary character, and its consistency in every respect with the corroborative evidence, will be discussed hereafter in this opinion.

Third: Consideration of the affidavits of Calvin Dennis stating that his testimony at the trial of this petitioner was false and was prompted by the promise of a relatively light sentence.

These affidavits of Calvin Dennis were signed on 24 August 1951 and 6 September 1951, long after his trial, conviction, and sentence. They were preceded by at least one previous attempt prior to trial to repudiate the statements at petitioner's insistence, which repudiation was later retracted and the truth of the original statements affirmed. In effect the affidavits purport to re-

fract as false all testimony given by Calvin Dennis in the trial of this case, and indirectly they attack his own statements on the grounds of promises, threats, and coercion. This present position of Calvin Dennis is complicated by the position he voluntarily took at the trial of his case when the defense specifically stated that there was no objection to receiving the statements in evidence, for his defense was predicated upon the theory that the statements reflected the truth. The statements admitted that Calvin Dennis was at the scene of the original assault but did not admit that he was at the scene of the crime and asserted his lack of participation in the crime and his ignorance of the plan of his accomplices to commit it. The insistence by Calvin Dennis upon the truth of the statements because they were favorable to him, and the making of no claim at his trial that the statements were improperly obtained, prompts an inference that the affidavits are insincere. If the court had believed that his statements were true in their entirety, Calvin Dennis would now stand innocent and free; and the conclusion is inescapable that the affidavits are the result of ulterior motives, for he now has nothing to lose by giving them. The testimony, statements, or confessions of an accused accomplice are not to be summarily disregarded because he subsequently, for some motive, changes, qualifies, or retracts them. If the accomplice confesses, or testifies against his co-accomplice and "he changes or qualifies or retracts, as he sometimes does, as hope or interest or fear sways him, his testimony or confession is not to be summarily discarded, but to be judged of by confirming or oppos-

ing circumstances as well as by his character and the influences that may invest him." (*Valdez* v. *United States*, 244 U. S. 432). If his testimony was consciously and corruptly false, as Calvin Dennis now asserts, such a self-imposed indictment of his own character offers little to inspire confidence or recommend credence in his affidavits. When he testified at the trial of petitioner he repeatedly asserted that he did so voluntarily with full knowledge of his rights, and he sustained himself through a searching cross-examination. So on this point I must accept Calvin Dennis' testimony at the trial, with the ample corroboration furnished by the other witnesses, rather than his statements in these affidavits, as presenting the true version of petitioner's participation in the crime.

Fourth: Consideration of the affidavits of Mr. Edward F. Daly and Miss Mary Louise Hill as tending to support the theory of the involuntary nature of Calvin Dennis' confessions and his testimony at the trial of this petitioner, and as reflecting upon the method of conducting the trial.

Counsel argued that the mentioned affidavits support the allegations that are made in the petition with regard to the involuntary nature of the confessions of Calvin Dennis, and his testimony at the trial of petitioner, and in addition, they make serious charges against the method of conducting these entire proceedings in Guam. In their memorandum in support of the petition counsel review the testimony of the witnesses in this case and they conclude that there was little if any basis in the evidence for implicating petitioner in the crime except for the testimony of

Calvin Dennis, without which the conviction of petitioner could not stand. In my discussion of point "Third" I pointed out my reasons for concluding that the testimony of Calvin Dennis at the trial of petitioner, amply corroborated by other witnesses, will be preferred to the statements contained in his affidavits. Counsel recognize that if the testimony of Calvin Dennis in this case is permitted to stand, petitioner's guilt of the crimes of murder and rape is established beyond any doubt. I realize fully the extreme importance of such evidence, and with this in mind the testimony has been read and re-read to determine whether Calvin Dennis gave his testimony as the result of improper influence, and whether any clear reason is presented for his statement under oath at this juncture that "I perjured myself because threats were made against me that if I didn't so testify I would receive the death penalty, and that if I did so testify I would be rewarded by a relative light sentence." I find nothing of the sort in such testimony or elsewhere in the record. To the contrary, the record discloses not only that his testimony was consistent throughout with the corroborative evidence, but also that commendable care was taken to assure that Calvin Dennis appeared as a witness voluntarily and that no coercive influence was exercised upon him. For example, see the record of trial (pages 52, 53):

> Q. State your full name.
> A. Calvin Dennis.
> Q. Have you had your rights explained to you under the 24th Article of War?
> A. Yes, sir.

Q. Do you realize that you do not have to testify here today?

A. Yes, sir.

Q. Do you testify here voluntarily?

A. Yes, sir.

Q. Do you desire to testify today?

A. Yes, sir.

LAW MEMBER: Do you understand that anything you say here today may at some future date be used against you if it indicates that you have committed a crime?

WITNESS: Yes, sir.

LAW MEMBER: Nothing that has happened to you in the past will in any way protect you if your testimony before this court should happen to incriminate you in a crime? Do you understand that?

WITNESS: Yes, sir.

See also the record of trial at pages 70, 71, 74, and 75 as further proof of the precautions taken to assure that no coercive influence was exerted upon the witness. The Judicial Council and the Board of Review have concluded that Calvin Dennis was fully protected by the court when he testified at petitioner's trial; and a further reading of that testimony points inexorably to the conclusion that it was not procured by the employment of duress, artifice, or coercion. Where the evidence as to whether there was coercion is conflicting, or where different inferences may fairly be drawn from the admitted facts, the question whether a confession was voluntary is for the triers of the facts (*Lyons* v. *Oklahoma*, 322 US 596; *Lisenba* v. *California*, 314 US 219). This rule applies with equal force to the repetition by Calvin Dennis of the substance of his confessions as testi-

mony in the trial of petitioner, and the court's decision on the voluntary nature of the testimony, arrived at from first-hand hearing and observation, is presumptively correct and will not be disturbed unless manifestly erroneous (*MGM Corporation* v. *Fear,* 104 F. 2d 892; ACM 3597, *Maddle,* 4 Court-Martial Reports [AF] 573).

It should also be noted that insofar as the affidavits make charges reflecting upon the method of conducting these proceedings, Mr. Daly alone makes the assertions contained in his affidavits, and no further substantiation of these allegations has been presented. Further, the various allegations and charges of Mr. Daly as set forth in his affidavits, and the various statements of Miss Hill, were made the subject of an exhaustive investigation by the Directorate of Special Investigations, Office of the Inspector General, United States Air Force, both from the standpoint of the charges made and the motives for making the charges. I have again reviewed the results of this investigation and I can arrive at no different conclusion than that previously reached, that the charges are unfounded.

Fifth: *Prejudicial statements in the record.*

(a) It is contended by counsel that it was made to appear to the court that Calvin Dennis and Herman P. Dennis, Jr., were brothers. An affidavit of Calvin Dennis to the contrary was submitted in connection with his petition. The following appears in the record (page 58):

> Q. Who is Herman Dennis, do you know?
>
> A. Herman Dennis is supposed to be my half brother.

Counsel argue that such reference to blood relationship might have caused the court, in weighing the truth of the Dennis confessions and the testimony of Calvin Dennis implicating petitioner, to attach more weight and credibility to such evidence than if the two men had appeared to be unrelated. This argument has remote application to this petitioner; but in any event it is impossible to determine at this juncture whether the court would believe that a man making statements implicating his own brother would be impelled by higher motives of truth than an accomplice not so related, or whether, contrariwise, it would suspect ulterior design, and attach less credibility to such statements. But this determination involves conjecture and speculation of a high order, in which I am not required to indulge, because any conclusion reached by such process could have no value in determining the weight of the evidence. The court must be presumed to have taken into consideration all matters affecting the testimony of witnesses when weighing the evidence, prior to making its findings (*Larsen* v. *Portland S. S. Company* 66 F. 2d 326, 329) and I will not attempt to speculate in retrospect that the decision of the trial court on the credibility of witnesses could have been affected by evidence so intangible as that urged (*MGM Corporation* v. *Fear,* 104 F2d 892). Clear and convincing proof is required to set aside the judgment of a general court-martial, and matters of claimed injustice must be sustained "not as a matter of speculation but as a demonstrable reality" (*Adams* v. *United States ex rel. McCann,* 317 US 269, 281).

(b) It is also contended that the decision of the court finding petitioner guilty was affected by the testimony of the witness Miss Blackledge given in the trial of Herman P. Dennis, Jr., to the effect that that accused had stated to the witness his feeling of unhappiness at segregation, his unhappiness in the South, and his desire to take her picture. This testimony occurred only in the trial of Herman P. Dennis, Jr., (Record of Trial, in that case, page 77), and hence the argument of counsel based thereon can have no application to this petitioner.

Sixth: Petitioner was denied counsel of his choice.

Statements appear in the affidavit of Mr. Daly (October 1949) that raise the points that petitioner was denied counsel of his choice, and that his counsel "had one day in which to prepare his case and took approximately 1½ hours to put on his defense." It is sufficient to state that independent investigation heretofore referred to disproves these contentions. This investigation further proved to my satisfaction that the Commanding Generals were entirely within their prerogative as enunciated by paragraph 45a, Manual for Courts-Martial, USAF, 1949, in declaring as not available the counsel chosen by petitioner, former Lieutenant Colonel Edward F. Daly, and that they did not have ulterior motives, as is intimated, in declaring him (Daly) unavailable. But without regard to the legal rule that the determination of the availability of qualified defense counsel within the meaning of Article of War 11 is a matter exclusively within the dis-

cretion of the appointing authority whose determination is final (Manual for Courts-Martial, 1949, par 45a; *Hiatt* v. *Brown*, 339 US 103; ACM 2437, *Quinn*, 3 Court-Martial Reports [AF] 108) or the further rule that petitioner may not complain that he was inadequately represented by his deliberately selected counsel (*Adams* v. *Hiatt*, 79 F Supp 433; *Morton* v. *Welch*, 162 F 2d 840; *Setser* v. *Welch*, 159 F 2d 703; cert den 67 S Ct 1510), the record shows that capable counsel had been made available to petitioner, and that in open court he expressed a desire to be represented by individual counsel of his own selection, assisted by the regularly appointed defense counsel and assistant defense counsel as associates. Scrutiny of the record convinces me that petitioner was defended with loyalty, ability, and skill, which perforce attained for him the standards required by the concepts of a fundamentally fair trial (*Moss* v. *Hunter*, 167 F 2d 683; *Altméyer* v. *Sanford*, 148 F 2d 161; *Romero* v. *Squier*, 133 F 2d 528; *Liner* v. *Cozart*, 80 F Supp 540).

Seventh: Important evidence was withheld from the court at the trial.

Finally, it is contended that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was withheld from the court (Daly affidavit, dated 30 August 1951). Here again, this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless. Further, a presumption obtains that a

person acting in the capacity of a public officer performed his duties properly (Manual for Courts-Martial, 1949, par. 125a; Manual for Courts-Martial, 1951, par. 138a) and such presumption of regularity may be indulged as to officers charged with the administration of military justice (CM 320618, *Garner,* 70 Board of Review 71; CM 332704, *Bilbo,* 81 Board of Review 185) and as to courts charged with protecting fully the rights of an accused person (*Rudolph* v. *Lockwood,* 2 F. 2d 319; *Johnson* v. *Wilson,* 131 F. 2d 1). Therefore, I hold, there being no clear showing to the contrary, that the officers who investigated this case, prepared and preferred charges and prosecuted the case before the court, were not remiss in the performance of their duties. They were vested with wide discretion in developing and sorting the evidence to be used, and in choosing the witnesses conceived to be necessary to present the case properly, and the order and manner in which the evidence would be presented. Petitioner attempts to insinuate an element of doubt into the case by intimating that material evidence helpful to the defense was suppressed, but he fails to point out how such evidence was material to his defense, or how it affected or prejudiced him in any way. The force of such a suppositive argument is minimized by my own study of the reports of investigation of these matters, and I hold that in order to avail petitioner anything, such intimations and accusations must be supported by grounds less speculative and abstruse than those presented.

5. As previously stated, I have re-examined the reports of the comprehensive investigations

which were conducted at my request, and I have examined the entire records in this and its allied cases, in the light of the grounds set forth in the petition, and I hold that the petition presents no good cause for the relief sought, and that no injustice to petitioner is shown.

Therefore, no good cause for relief within the purview of Section 12, Act of 5 May 1950 (formerly Article of War 53) having been shown, the petition will be *denied*.

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

U. S. GOVERNMENT PRINTING OFFICE 1951

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUN 30 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952.

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,

Petitioners,

vs.

CHARLES E. WILSON, Secretary of Defense, Harold E. Talbot, Secretary of the Air Force, General Hoyt S. Vandenberg, Chief of Staff, United States Air Force.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL,
Counsel for Petitioners.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

IN THE

Supreme Court of the United States

October Term, 1952

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,

Petitioners,

vs.

CHARLES E. WILSON, Secretary of Defense, HAROLD E. TALBOT, Secretary of the Air Force, GENERAL HOYT S. VANDENBERG, Chief of Staff, United States Air Force.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully present this petition for rehearing on the following grounds:

I.

Petitioners were not afforded adequate opportunity to submit their view on the issues on which decision here was based.

Because of the unsettled nature of the law at the time of the submission of this cause, petitioners had no opportunity to address themselves to what now appears to be

the decisive question—whether petitioners' claimed denials of due process were given "fair consideration" by the military.

The District Court dismissed the petitions for writs of habeas corpus on the ground that its inquiry was limited solely to the question of whether the military tribunal had jurisdiction in the narrow sense. 104 F. Supp. 310. On appeal, the sole issue submitted in briefs and argued orally was whether the scope of inquiry on habeas corpus could reach those questions of due process raised in each petition. The Court of Appeals affirmed but defined the reach of habeas corpus under a new rule similar to that applicable in state custody cases. 202 F. 2d 335.

When the cause reached this Court, petitioners had to address themselves to attacking the bases on which the lower courts had denied hearings on the merits in the District Court. Those judgments are now affirmed, but again on a different basis.

Petitioners realize that Mr. Chief Justice Vinson, Mr. Justices Burton, Clark, Reed and possibly Mr. Justice Jackson feel that fair consideration was given by the military to each of petitioners' claims. But this issue was not clearly before the Court and petitioners had no adequate opportunity to address argument on this point. "Fair consideration" means, in our understanding, a determination of constitutional due process under applicable standards of this Court. It certainly cannot encompass decisions based upon factors which are not a part of this record and which, therefore, cannot be properly weighed. These problems were not developed nor considered in the submission of this cause. Petitioners do not seek merely to reargue claims made in the military process, but if the scope of inquiry on habeas corpus may reach the question of whether claims of denial of due process were fairly considered by military courts, then petitioners should be permitted to address themselves to that question before their sentences are ordered executed.

II.

At no point in the military process were the standards of this Court on a determination of the voluntary nature of a confession applied to petitioner Dennis' claims that his confessions had been coerced.

The principal opinion in this case declares that "the military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." Petitioners do not discern any substantial difference between this view and that of Mr. Justice Douglas. Petitioners read this to mean that a majority of this Court agree that an accused before military courts must be accorded procedural due process pursuant to constitutional guarantees. In the light of the opinion of the Chief Justice, however, the crucial question is whether a claimed denial of constitutional rights was given "fair consideration" by the military authorities.

Petitioner Dennis claims that he was convicted by the use of involuntary confessions. To give "fair consideration" to this claim, we submit, the military courts must look to the concept of voluntariness as evolved by this Court. They must look to the gloss which this Court has added—the gloss of *Lisenba* v. *California*, 314 U. S. 219; *Malinski* v. *New York*, 324 U. S. 401; *Haley* v. *Ohio*, 332 U. S. 596; *Watts* v. *Indiana*, 338 U. S. 49. The constitutional rights of those subject to the military jurisdiction will have real meaning only if the military conscientiously applies the constitutional standards set forth by this Court. Unless the military is required to do this, binding effect will be given to military adjudications on questions of constitutional law which are contrary to decisions of this Court. This, we submit, the Court cannot permit. 28 U. S. C. 2241. See *Brown* v. *Allen*, — U. S. —, 97 L. Ed. (Advance pp. 375, 412, 413).

1. Constitutional Standards Of This Court Applicable To This Case.

While there has been disagreement in the application of the Court's standards to varied fact situations, there is certainly no disagreement with the position of Mr. Justice Roberts *"that where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means."* *Lisenba* v. *California, supra,* at 240 (italics supplied).

As recently as *Stein* v. *New York,* — U. S. — 21 U. S. L. Week 4469, 4477 (June 15, 1953) this Court stated that the fact that an accused is held in custody for a prolonged period of time incommunicado is relevant circumstantial evidence in the inquiry as to physical and psychological coercion.

In scrutinizing the record, this Court has always given full consideration to the age of the accused, his intelligence and education and all other factors which throw light on the question whether the confession was really the result of psychological coercion which overpowered mental resistance. *Haley* v. *Ohio, supra; Ward* v. *Texas,* 316 U. S. 547; *Lisenba* v. *California, supra; White* v. *Texas,* 310 U. S. 570; *Chambers* v. *Florida,* 309 U. S. 227. In *Stein* v. *New York, supra,* Mr. Justice Jackson stressed the fact that the defendants "were not young, soft, ignorant or timid," and "were not inexperienced in the ways of crime or its detection", nor "dumb as to their rights."

2. The Undisputed Facts Here.

The undisputed facts here are that petitioner Dennis was held incommunicado for five days without benefit of counsel prior to his first confession and subjected to

repeated questioning. He was only twenty years of age and below average in intelligence.[1] He was a Negro, held in custody thousands of miles from home and friends, interrogated by military superiors, see *United States* v. *Monge*, 2 CMR 1, 4 (CMA 1952), and charged with a crime which stirs frenzied emotions—rape of a white girl.

3. Standards Applied By The Military.

The military, however, did not apply this Court's standards, but its own, to these undisputed facts. The Judge Advocate General of the Air Force disposed of petitioner Dennis' claim with the observation that where evidence as to coercion is conflicting, the question is properly one for the triers of fact. (App. B, Respondent's brief, p. 101.) See also 4 CMR (AF) 906. The Judicial Council disposed of this contention similarly. 4 CMR (AF) 899-900. The Board of Review considered only the intensity of interrogation and did not evaluate or consider the fact that petitioner was held incommunicado, his intelligence and education, his race, the nature of the crime charged, and distance from home and friends in determining the voluntary nature of these confessions. 4 CMR (AF) 885. Clearly the military reviewing authorities did not "scrutinize the record with care" in the light of the applicable decisions of this Court.

Thus, in order to resolve the question of whether petitioner's claim was given "fair consideration", it becomes crucial to examine the standards applied by the triers of fact. At the trial, the Law Member's instructions with respect to the confession contained no definition whatever of voluntariness. His entire charge on this point was as follows:

> "The ruling is that all four of the purported documents will be received in evidence. In connec-

[1] The record shows that his Army AGCT test score was only 70. 4CMR (AF) 906. He just misses being an illiterate which is the classification of those scoring 69 or below.

tion with this ruling, the law member calls attention of the court to *paragraph 127a* of the *Manual for Courts-Martial, 1949,* reading in part as follows:

> "'The ruling of the law member that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court. The ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto.'" (Dennis, C. M. Tr. 275).

Nowhere is there an adequate exposition of the standards for voluntariness set forth by this Court. The pertinent portions of the Manual on this point follow:

> "No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion or unlawful influence in obtaining a confession or admission are:
>
> "(1) Infliction of bodily harm, including prolonged questioning accompanied by deprivation of the necessities of life (food, sleep, adequate clothing, etc.).
>
> "(2) Threats of bodily harm.
>
> "(3) Imposition of confinement or deprivation of privileges or necessities because a state-

ment is not made by the accused, or threats of the same if a statement is not made.

"(4) Promises of immunity or clemency with respect to an offense allegedly committed by the accused.

"(5) Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused." MCM (AF), 1949 at 158.

Even assuming that the triers of fact sought to use these examples as guides for determining whether these confessions were voluntary, no help was furnished in making an evaluation of the undisputed facts adduced here. Examples one and three come closest to this case, but neither, because of their inherent limitations, are applicable here.[2]

Thus the triers of fact, in determining whether petitioner's confessions were voluntary, were not required to weigh or evaluate the coercive effect of his prolonged detention without the advice of counsel or friends, his age or his intelligence, his race in connection with the crime charged or the questioning to which he was subjected.

Nowhere were these factors considered in determining the question of voluntariness at any point in the military establishment. Nowhere were the guides and standards of this Court applied. Thus, we submit, it cannot be said that this claim was fairly considered by the military authorities.

---

[2] Example one contains the clear implication that prolonged questioning cannot be considered coercion unless it is accompanied by a deprivation of the necessities of life. Example three relates only to confinement or deprivation of privileges or necessities or threats of the same resulting from an accused's refusal to make a given statement.

III.

The allegations outside the courts-martial record were considered only on the application for new trial.

Certain claimed denials of constitutional rights were considered for the first time on petitioners' applications for new trials pursuant to former Article of War 53. These claims involved the use of perjured testimony, attempted subornation of perjury by the prosecution, intimidation and harassment of defense witnesses, the knowing use of planted evidence and suppression of evidence, and the conduct of the trial in an atmosphere of terror and mob violence. After refusing to consider the affidavit of Calvin Dennis, the government's witness, that he testified falsely on the grounds that there was "little to inspire confidence or recommend credence in his affidavit" (App. C, Brief for Respondents, pp. 120-122), the Judge Advocate General disposed of the other claims recited here on the basis of a confidential investigation. No doubt witnesses were interrogated, but these witnesses were unknown to petitioners and their confidential testimony—not subject to cross-examination—was the basis for the Judge Advocate General's conclusions. As the Chief Justice points out, this proceeding is not a part of the record of this case. Therefore, it cannot form the basis for a conclusion that "fair consideration" was given to these claims.

With respect to the charges that perjured testimony and planted evidence were used, the principal opinion of the Court expressly states that its conclusion is not predicated on the investigation and confidential report of the Judge Advocate General. Rather, these charges are disposed of on the ground that they were "either explored or were available for exploration at the trial."

The charges relating to the knowing suppression of evidence, attempted subornation of perjury and efforts to

intimate those who sought to help petitioners and the conduct of the trials in an atmosphere of hysteria and mob violence are not dealt with in the opinion of the Chief Justice. We assume, however, that these charges were disposed of on the same ground alluded to above. Since the Chief Justice disposes of all of these charges without relying on the confidential report of the Judge Advocate General, what the opinion of the Chief Justice really seems to be stating, we submit, is not that the military gave "fair consideration" to all these charges, but merely that petitioners have no right to raise subsequently charges which were available for exploration at the trial. This is indeed a harsh doctrine, especially where the lives of two soldiers are at stake.

The charge that Calvin Dennis' testimony was perjured was explored at the trial of petitioner Burns only in the sense that Calvin Dennis was interrogated with respect to the voluntariness of his statement and was subsequently cross-examined by defense counsel. But Calvin Dennis' retraction, as well as the corroborating statements of Colonel Daly and Mrs. Hill, became available to petitioners only after both trials terminated. It may well be that Hill and Daly had this information at the time of the trial. But knowledge on their part is not in fact or in the law knowledge of petitioners or their counsel.

The charges relating to knowing suppression of evidence, attempted subornation of perjury and intimidation of those who sought to help petitioners were in no way explored at the trial. Here, too, this information may have been in the possession of affiants Chaplain Grimmett, Colonel Daly and Mrs. Hill. It should be stressed that Chaplain Grimmett did not testify at either trial. Daly and Hill were called as defense witnesses in the Dennis trial solely on the point of the voluntariness of the confession. Their total testimony for the defense consumes a mere 2½ typewritten pages. It seems perfectly clear

that defense counsel had no knowledge of what additional information they might possess and no reason for so suspecting. Mrs. Hill did not testify at the Burns trial. Daly testified only as a prosecution witness and his testimony was confined to facts relating to his handling of prosecution's exhibit 17, the victim's smock.

For reasons only known to them, affiants Grimmett, Hill and Daly failed to disclose all at the time of the trial. The concerted effort by the prosecution to harass, intimidate, and suppress all aid to the defense may well explain their silence. There can be no inference that petitioners or their counsel had this knowledge when these men were tried.

In this connection, the Court's attention is directed to the fact that Francis L. Moylan, a witness for the prosecution, wrote the Court of Appeals while this case was there pending, that he was not permitted to testify that he had seen two other men at the scene of the crime, although he tried to bring this out. 202 F. 2d at 346 and note 73 at 351.

Further, that the investigation was carried on against a background of "extreme tension" was admitted by the prosecution's own witness (Dennis, C. M. Tr. 207). That the prosecution was guilty of attempted subornation of perjury in the case of Mrs. Hill is admitted by the Judge Advocate General of the Air Force. 4 CMR (AF) 906. It is a strange irony that the prosecution's campaign of intimidation and attempted subornation of perjury now reaps its reward in this Court's doctrine that the silence of Daly, Hill and Grimmett deprives petitioners of the opportunity to raise these serious charges of denials of fundamental due process.

The effect of the decision of this Court is to impute the knowledge of the three affiants to petitioners. Affiants' failure to disclose this information results in a waiver of petitioners' constitutional rights. Because of affiants' silence, petitioners go to their death. Such is not the stuff of which procedural due process is made.

CONCLUSION

For these reasons, we respectfully urge that this petition for rehearing should be granted.

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL,
Counsel for Petitioners.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

Dated: June 29, 1953.

Certificate of Counsel

It is hereby certified to this Court that this petition for rehearing is presented in good faith and based upon a firm conviction that the questions raised in this petition should be fully presented to this Court in brief and on oral argument. It is further certified that this petition is not presented for purposes of delay.

ROBERT L. CARTER,
FRANK D. REEVES,
THURGOOD MARSHALL.